

Digitized by the Internet Archive  
in 2022 with funding from  
University of Toronto

<https://archive.org/details/31761114667256>







CA20N  
XC2  
-87C52

C-21a  
(Printed as C-21)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, MARCH 30, 1988

Morning Sitting

Draft Transcript





SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)  
VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)  
Allen, Richard (Hamilton West NDP)  
Breaugh, Michael J. (Oshawa NDP)  
Cordiano, Joseph (Lawrence L)  
Elliot, R. Walter (Halton North L)  
Eves, Ernie L. (Parry Sound PC)  
Fawcett, Joan M. (Northumberland L)  
Harris, Michael D. (Nipissing PC)  
Morin, Gilles E. (Carleton East L)  
Offer, Steven (Mississauga North L)

Substitution:

Matrundola, Gino (Willowdale L) for Mrs. Fawcett

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Ontario Human Rights Commission:

Anand, Raj, Chief Commissioner

From the League for Human Rights of B'nai Brith Canada:

Adler, Simon, Central Region Chairman

Shefman, Alan, National Director

From the Women of Halton Action Movement:

LeFrançois, Beverley

Thompson, Karen

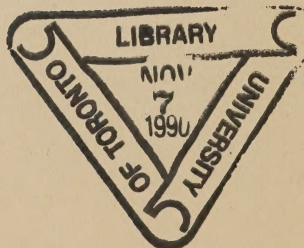
Mason, Kathy

From the Liberal Women's Perspective Advisory Committee:

Herdman, Patricia, Chairman

Pollock, Gloria, Executive Vice-Chairman

McPhedran, Marilou, Adviser





LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, March 30, 1988

The committee met at 9:41 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good morning, ladies and gentlemen. As Mr. Offer gives us instructions to avoid traffic jams on the Queen Elizabeth Way--

Mr. Offer: It is a science, Mr. Chairman. It is a science.

Mr. Chairman: --I would like to welcome this morning the chief commissioner of the Ontario Human Rights Commission, Raj Anand, who is with us. When we begin in the morning, Mr. Anand, we sometimes have traffic problems, but I think we will begin this session and get under way. I know some of our colleagues, who are undoubtedly stuck on Highway 404, the Don Valley Parkway, Highway 401 or the QEW, will soon be with us.

We are most appreciative of your coming this morning. In fact, our first two presentations this morning are with respect to human rights, or at least those who are active in the area, and that is a perspective that will be very useful to the committee.

I will turn the microphone over to you. We have a copy of your brief and will follow it up with questions.

ONTARIO HUMAN RIGHTS COMMISSION

Mr. Anand: I intend to deal with the substantive matters that are set out in my brief. It is not as daunting as it may look in its long, 8.5 by 14 inches format because a large chunk of it quotes some of the provisions of the Meech Lake accord dealing with equality rights, which I am sure all of the committee members have had imprinted indelibly on their minds by now. I certainly will not read them back to you, but I will deal with the substantive points that are set out there.

I am pleased to have this opportunity to address the Meech Lake accord from the human rights perspective. I shall begin by describing the commission's interest in the accord, then I shall address the two areas of the accord which are of particular concern to the Ontario Human Rights Commission, the Meech Lake process and the effect of the accord on rights contained in the Charter of Rights and Freedoms and, finally, I shall provide you with our recommendations for amendment of the accord.

First, in terms of the commission's interest, it is one of the key statutory functions of the human rights commission, and I quote from the code, "to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law."

Beyond this, the code prescribes a more specific function for the commission, "to examine and review any statute or regulation and any program

or policy made by or under a statute and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of" the code.

With this mandate in mind, I wish to address the process and the substance of the Meech Lake accord with respect to its effect on the charter.

First, in terms of process, going back to the promulgation of the charter itself, in the fall of 1980 Canadians were given an opportunity to express their views on the introduction of what we then called a bill of rights into our Constitution. In large numbers, representing many divergent groups within our society, they urged that the proposed Charter of Rights and Freedoms be given constitutional status. More particularly, they urged that section 1, the general limitation clause of the proposed charter, be strengthened to avoid reference to a parliamentary system of government and to ensure that parliamentary sovereignty was put to rest.

In response to these criticisms, the federal government amended section 1. The intent of the amended language, in the words of then Justice Minister Chrétien, was that laws be "demonstrably justified in relation to this charter...since the intention of a charter is to limit the scope of the Legislature and Parliament in relation to the fundamental rights of Canadian citizens."

Despite this clear prevailing view, an override clause, section 33, was added through political compromise. The so-called "November accord" allowed no opportunity for Canadians to consider the wisdom or desirability of an override provision. On the contrary, the accord thwarted the well-considered and popular position that parliamentary sovereignty be ended and that a bill of rights be entrenched in the Constitution in a manner which would ensure that fundamental rights and freedoms could not be changed by governments or legislatures without going through the constitutional amendment process.

It is generally accepted that the principal objective of the Meech Lake negotiations was to remedy the major shortcoming of the 1980 and 1981 constitutional process; that is, the failure to secure Quebec's approval of, and participation in, constitutional change which affected every part of the country. The Ontario Human Rights Commission most certainly endorses this objective, and we applaud the recognition of Quebec as a distinct society.

We find it disturbing, however, that in attempting to address the substantive shortcomings of those negotiations, the Meech Lake accord has repeated the unfortunate process of drafting constitutional amendments in the absence of full discussion by Canadians of the desirability of such amendments. It is not satisfactory, in our view, to assure us that amendments can always be made later. Constitutional amendment is difficult. Many different provincial concerns will be on future agendas. Such a response fails to take the views of equality-seeking groups seriously. It denies what ought to be unquestionable; namely, the importance of genuine consultation before fundamental constitutional changes are made to the supreme law of Canada.

This failure to consult takes on added importance because, in the commission's view, the proposed substantive changes embodied in the Meech Lake accord again weaken the Charter of Rights and Freedoms.

I move here to the substantive criticisms and recommendations.

The first ministers who signed the Meech Lake accord have stated that it



is not intended to, and does not, affect the constitutionally guaranteed rights to equality contained in the charter. Nevertheless, some constitutional experts and national women's groups have argued to the contrary. Indeed, since I wrote this, there have been many further groups, representing various minority interests, which have come before this committee concerning the effect of the Meech Lake accord on the equality rights of protected groups such as women, persons with disabilities, members of ethnic minorities and the aged.

Indeed, our concern, that of the commission, regarding the potential harm to charter equality rights applies to all of the groups who are protected against discrimination under the Ontario Human Rights Code, whether identified by race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap, or the receipt of public assistance.

On pages 3 and 4 of my brief, I have set out the text of the proposed section 2 and, as I have indicated, members of the committee will be well aware of the provisions of the four subsections as well as of section 16 of the proposed resolution, which states that section 2 of the Constitution Act is not to affect the multicultural or aboriginal people's rights as set out in sections 25 or 27 of the charter, section 35 of the Constitution Act 1982 and clause 24 of section 92 of the 1867 British North America Act.

#### 0950

In addition, on page 4 I have set out the proposed new section 95b of the Constitution Act, which refers to agreements between the government of Canada and any province relating to immigration or the temporary admission of aliens into the province. This provision, subsection 95b(3), may also be relevant because it again makes clear that the charter is to apply in spite of or over any agreement relating to immigration that has the authority of section 95b. Again, it is an expressed provision giving primacy to the charter.

The equality rights which the Human Rights Commission is concerned about are set out in sections 15, 25, 27 and 28 of the charter. I will not read those, but 15 is the omnibus equality provision which is an open-ended provision; 25 is the aboriginal rights provision just referred to; 27 is the multicultural heritage interpretations section, again just referred to; and section 28 is the sexual equality section that has been the subject of many of the submissions before you.

In the commission's view, there are four ways, and four distinct ways, in which the equality rights within the charter may be harmed. The first is by exemption of legislation under section 2 of the accord from charter review. The effect of the June 25, 1987, decision of the Supreme Court of Canada in the Bill 30 reference may be to insulate legislation which pursues linguistic or "distinct society" goals from charter view or to add further weight to claims that such goals are more important than those underlying equality guarantees in the charter.

I propose to deal with each of those in turn under this section.

In the Bill 30 reference, Ontario legislation which committee members are well aware granted equal funding to Roman Catholic denominational schools was upheld despite a challenge based on its violation of religious freedom and equality rights. The court held that it was unnecessary to resort to the specific guarantee of denominational schools in section 29 of the charter

because there was an express grant of legislative power in section 93 of the original BNA Act.

The plurality judgement was written by Madam Justice Wilson, who said: "I believe section 29 was put there simply to emphasize that the special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the the concept of equality embodied in the charter because not available to other schools, is nevertheless not impaired by the charter.

"It was never intended, in my opinion, that the charter could be used to invalidate other provisions of the Constitution, particularly a provision such as section 93 which represented a fundamental part of the Confederation compromise." It is that sentence that I think is of vital importance to the matter before you.

"Section 29, in my view, is present in the charter only for greater certainty, at least in so far as the province of Ontario is concerned."

Mr. Justice Estey, on behalf of himself and one other judge, stated: "Although the charter is intended to constrain the exercise of legislative power conferred under the Constitution Act 1867, where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act 1867." What, of course, he was referring to was section 93 of the original Constitution Act 1867.

These brief excerpts from the two principal judgements of the court set out, in the commission's view, the two alternative ways in which section 2 can exempt legislation from the charter.

In our view, it is possible that portions of the Meech Lake accord may be considered analogous to--and this is the quote from Madam Justice Wilson--"a fundamental part of the Confederation compromise" and, therefore, take precedence over the charter. Alternatively, it is possible that section 2 of the accord will influence what constitutes "an expressly permitted distinction"--those are Justice Estey's words--and thereby widen the ambit of legislation which will prevail in spite of the charter.

The report of the special joint committee of the Senate and House of Commons issued last year took a contrary view. It stated that if section 2 of the accord did not grant any legislative powers, then it could not be understood as analogous to section 93 of the Constitution Act, and therefore could not be considered a fundamental part of the Confederation compromise; nor, in their view, could it be understood as "expressly permitting" a distinction, in the words of Justice Estey, which would then take precedence over charter rights. We disagree with their reasoning.

First, while section 2 of the accord does not directly grant legislative powers, it can be used to enhance legislative power by assisting a government in defining the purposes of a given piece of legislation in such a way as to permit a finding of *intra vires*; that is, of constitutionality. It is possible, therefore, that legislation saved in this way through section 2 will be considered a fundamental part of the Confederation compromise and will override the charter.

This argument is strengthened by the similarity between the language of clause 2(1)(a) itself, stating that duality constitutes "a fundamental



characteristic of Canada," and the words of Madam Justice Wilson I just read, which insulated from the charter provisions which represented a fundamental part of the Confederation compromise.

Second, even as an interpretative provision, section 2 of the accord can assist in determining whether a power-granting provision of the Constitution Act expressly permits a distinction which, according to Justice Estey, would then render it immune from charter review. I use as an example the well-known Lavell case in the Supreme Court of Canada in which the appellant Lavell argued that the legislation depriving her of Indian status when she married a non-Indian discriminated against her on the basis of sex, because males in similar circumstances retained their Indian status. The Supreme Court decided that the legislation was concerned with a distinction on the basis of race, and was therefore expressly permitted by subsection 91(24) of the original BNA Act.

Hence, determination of whether a distinction is expressly permitted by a constitutional head of power is not uncontroversial; moreover, it can be influenced by an interpretative provision such as section 2 of the accord. A court may be more inclined to find that a distinction enacted under subsection 2(1) of the Meech Lake accord--in other words, one whose purpose was to preserve a fundamental Canadian characteristic or to promote the distinct identity of Quebec--was one expressly permitted by the Constitution Act and was, therefore, beyond the reach of the charter.

Let me deal with the other ways in which the commission believes the accord can impinge on the charter by, second, permitting substantive encroachment on the charter. Here I do not rely upon the characterization of section 2 as analogous to section 93 of the BNA Act. Nevertheless, section 2 may well permit substantive encroachment upon charter rights.

#### 1000

Our reasons are these: Subsection 2(1) states that the Constitution "shall be interpreted in a manner consistent with" the recognition of a "fundamental characteristic of Canada" as well as the recognition of Quebec as a "distinct society." Subsections 2 and 3 suggest that there is a grant of legislative power in section 2, and the existence of subsection 4 reinforces this possibility. That is the provision, as you will recall, which states that section 2 is not to derogate from the powers of the legislatures or of a Parliament or of the governments of the provinces or of Canada.

Subsection 2(4) leaves open the possibility that while the powers are not to be diminished, they may be increased. Since they cannot be increased at the expense of either government, because of subsection 2(4), they must be increased at the expense of the rights and freedoms of individual Canadians and minority groups. A government could seek to defend legislation that adversely affects the equality rights of a minority group or women on the basis that the law furthers the goals specified in clauses (a) and (b).

In resolving a dispute about legislation where section 2 is relied upon as a defence, a court would undoubtedly examine the wording of the Constitution Amendment, 1987, as a whole and the historical setting in which it was created. Section 16 of the act--I know this point has been made before you earlier--expressly states that section 2 does not affect sections 25 and 27 of the charter. This selective approach gives rise to the inference that

other provisions of the charter, including sections 15 and 28, are to be affected. Those are the principal equality rights provisions in the charter.

The same point applies with respect to section 95B, which I mentioned earlier. It states that the charter applies with respect to any agreement on immigration entered into under that section. The absence of a similar express provision with regard to other parts of the Meech Lake accord again leads to the inference that these provisions are to be unaffected by the charter.

The third point in terms of the harm that can be caused by the accord to equality rights is by the creation of a hierarchy among charter provisions.

The combined effect of sections 2, 16 and 95b of the accord may be to create a hierarchy among charter rights. The language of these sections as currently drafted obviously creates a hierarchy among interpretative charter provisions and throws into question the respective weight to be given to the equality rights when they are in danger of being diminished.

For example, sections 25 and 27 will become, in some respects, more important than section 28. In considering whether legislation violates section 15 of the charter or is sanctioned by section 1 as a reasonable limit, the preservation and enhancement of multiculturalism and the rights of aboriginal peoples will be afforded more weight than the equality of male and female persons. The "notwithstanding" provision in section 28 will not be of assistance, since it refers only to anything in the charter and not to anything in the Constitution, as does the accord; nor is section 28 recognized and protected within the accord, as are sections 25 and 27.

In considering the groups that cannot be argued in any sense to be covered by sections 25 and 27, comparable concerns to those of women arise. By the application of similar reasoning, groups identified by the following grounds may find their equality rights diminished as a result of a hierarchical ranking: creed, which is a ground in our code that has been interpreted to include religion, and citizenship, sexual orientation, age, marital status, handicap, receipt of public assistance and family status.

Indeed, in exempting from this list the groups specifically identified by race, colour, national origin and so on, I am assuming something which is quite controversial; that is, that the rights of such multiculturally identified groups are protected adequately by section 27, by the reference in section 16 to section 27 of the code. I know that a number of organizations have appeared before you and I share their concerns to the effect that the reference in section 16 itself, apart from creating problems with respect to other groups, may not have the desired effect itself with respect to these ethnically identified groups.

My fourth point relates to the accord providing a constitutionally stated justification for limiting equality rights and the key here is section 1 of the charter, the "reasonable limits" section.

Section 2 of the accord can affect a court's interpretation of section 1 of the charter. In determining whether legislation constitutes a reasonable limit, the court will consider the purpose of the law. In the case of Regina versus Oakes, the Supreme Court stated that the legislative objective must be of "sufficient importance" in order for the test to be satisfied. The legislative purposes set out in section 2 of Meech Lake will be very influential in the determination of whether a given legislative purpose is of sufficient importance. In instances where the purpose of the legislation is to

promote the "distinct identity of Quebec" or to preserve a "fundamental characteristic of Canada," it may be more likely to pass the test as a reasonable limit "demonstrably justified in a free and democratic society."

Moreover, Oakes permits the evidentiary burden of section 1 to vary with the facts of the case. Where the legislation pursues an objective under section 2 of the accord, the court may choose to lessen the evidentiary burden which is necessary to discharge the requirements of section 1.

This is possible because section 2 of the accord, in affirming the role of Parliament and the legislatures, stresses governmental responsibility for preserving the stated "fundamental characteristic of Canada" and promoting the "distinct identity of Quebec." The emphasis on the action of governments as opposed to courts encourages the application of a concept used by the European Court of Human Rights called "margin of appreciation" in relation to legislation passed in pursuit of the purposes of the accord.

This concept emphasizes a deference to government and to a government's view that a limitation on rights is reasonable or justified. Section 2 encourages courts to defer to what a government may view as reasonable measures to preserve, for example, the linguistic duality contained in caluse 2(1)(a). As governmental perspectives and priorities change, this adds an additional element of uncertainty to the weight to be given to the rights contained in the charter when these rights collide with such measures.

By way of conclusion and recommendation, the Ontario Human Rights Commission fully supports the promotion and enhancement of bilingualism and is sensitive to the need for other Canadians to accommodate the legitimate concerns of Quebec within our constitutional framework. Nevertheless, we consider that the starting point for negotiation and constitutional amendment must be a secure Charter of Rights and Freedoms. Without exaggerating the effect of the Meech Lake accord on the charter, in our view there is sufficient evidence to indicate that security has been shaken and must be re-established.

Our recommendation, in form and in terms of legal drafting, is a simple one. We recommend that a provision be inserted in the Meech Lake accord to make clear that nothing therein is intended to affect the Charter of Rights and Freedoms. It is, if you like, the broadest of the proposals with respect to equality rights that I believe you have heard about. You have heard about providing specifically for the exemption of section 28 which has been, of course, sanctioned by the Quebec francophone women's groups. You have heard about exempting sections 15 and 28. In our view, rights should not be the subject of further hierarchies. We simply say that the charter itself should be made clear to be exempted from the Meech Lake accord. This result could be achieved through a simple amendment to section 16 which presently provides for a couple of sections to override the accord, or alternatively, through the addition of a new subsection to section 2 of the proposed accord.

#### 1010

Given the widespread assurances by first ministers that this is the intended effect of the accord--that is, the charter is to prevail--an amendment of this kind should be noncontroversial and unlikely to upset the delicate political balance that is embodied in the Meech Lake accord.



That is the submission on behalf of the commission, Mr. Chairman. I would be happy to answer any questions you and the committee members may have.

Mr. Chairman: Thank you very much. That is an extremely thoughtful, pertinent and specific presentation. I think you raise a number of very critical questions that, as you note, have perhaps been raised in other respects by other groups, but I think you have put them together in a way that absolutely demands consideration and an answer. We are most grateful to you and to the commission for focusing very clearly on the charter and the relationship to the accord. We will start our questioning with Mr. Allen.

Mr. Allen: I appreciate Mr. Anand's coming before us and reflecting, out of both his legal experience and his work at the Ontario Human Rights Commission, views, perspectives and critiques of the Meech Lake accord that I think we have to take very seriously. I want to ask you a fairly simple question first off and then go to something that perhaps is more frontal.

In your last comment in your conclusion, you state that something should be entered in the accord which indicates that nothing in the accord is intended to affect the Canadian Charter of Rights and Freedoms. Do I take it that when you speak that way, you use the word "charter" as a code word for section 15 of the charter, or do you refer to the charter as a whole? I ask that because, as we all know, the charter itself contains "notwithstanding" and alternative routes and other possibilities with respect to the balance between legislative power, the courts and what have you.

I want to know, first of all, whether by using "charter" you really mean section 15 or whether you really intend at that point to include, in your reference, section 1, section 33, the second part of section 15 which deals with affirmative action and so on.

Mr. Anand: Your question is anything but simple, but I will attempt to answer it. You have raised a fundamental issue here, which perhaps lies beneath the surface of our submission; that is, the charter itself provides a balancing process between various rights. You mentioned section 1, section 33, section 15 and section 28. There has also been reference to sections 25, 26 and 27 and so on.

The short answer, and perhaps the simple answer, to your question is that the intent of our recommendation is that the charter itself be exempted in the sense that it be made clear that the accord is not to affect the charter in the way that has been done in a piecemeal fashion in section 16 and subsection 95B(3), which I referred to, of the accord. The task would then be to undertake the balancing process in the context of the charter itself. Our view is that the charter provides a well thought out and comprehensive way of undertaking that balance, and into that balance can be put "distinct society" and "fundamental characteristic" concerns. The short answer is that the entire charter is intended to be exempted and not simply section 15.

Mr. Allen: I asked that because, as you know, that makes the issue much more subtle than it is to most of the groups that come before us and want charter pre-eminence. I think they have a sense that what is being referred to is section 15, the defence of women's rights pure and simple, or aboriginal rights or multicultural rights, as the case may be, rather than a device which really does still leave a lot of room for balancing and for interplay between various collective rights and individual rights and what have you.

I guess what concerns me most is that I am not quite sure, in responding

to that public concern, whether we are really doing it by doing what you are suggesting we do, because it does provide all those options, alternatives, notwithstanding, etc. What is your response to that?

Mr. Anand: The existence of the options and alternatives is something I alluded to briefly at the outset. For example, section 1 and its strengthening was a byproduct of the public consultation in 1980-81. The addition of section 33, as I noted, was not the product of any consultation; it was the November accord. If we had to revisit the manner in which the charter is drafted, I am sure that I, and constitutional scholars much more qualified than I, would have a shopping list of ways in which the charter itself could be improved and enhanced.

That is not something I attempted to address here. The assumption here is that the charter provides for protection that is adequate, for present purposes, to a variety of groups, and a variety of rights that do not necessarily pertain to specific groups--freedom of speech, freedom of religion and so on--and that the most comprehensive and fairest approach is to simply leave the status quo in terms of charter protection as it is.

Part of the reason I advocate this approach, as opposed to a piecemeal shopping list kind of approach, which you have heard about from some other groups, is that the Ontario Human Rights Commission has a responsibility to represent a diversity of groups. Indeed, many of the cases and many of the activities that come before us involve a balancing of different interests of different groups. Human rights often collide, and in this context the charter is seen as the best way to resolve that, rather than by giving precedence to women's rights over others, or giving precedence to multicultural rights over others or aboriginal rights over others.

Our approach is to simply recognize what, as I say, has been stated by first ministers, which is that the intent was not to diminish the charter or the effect of the charter in any way.

Mr. Allen: I must say I am considerably sympathetic to your proposal, given that explanation, but I want to ask you: When I look, for example, at Madam Justice Bertha Wilson's judgement on the Bill 30 case and the question of the collision of section 93 in the 1867 document with the charter, I guess I do not personally find there so much a cause for anxiety as some reassurance that the court is able to deal with the interplay and interaction of different rights that do exist, collectively and individually, in our Confederation.

I would be much more concerned if there had simply been a straight and kind of fundamentalist assertion that equality absolutely overrides anything in the 1867 agreement, because I do think there are such things as historic rights attached to given communities that are important over time and that we do fundamentally threaten Confederation when we easily put them to one side in the name of perhaps some forms of individual right.

1020

Equally, I have problems, for example, with some ways in which the charter is currently being used by some with more power, influence and resources to establish their individual rights over against some other individual rights, for example, the Lavigne case, where you have the collective right of an entity like a trade union to pursue certain goals and then members on an individual exemption basis using the charter to get out of

responsibilities they should themselves accept as part of a normally functioning social or economic group. That can very easily undermine some very fundamental rights which are attached to groups and organizations in the community.

I want to come back to my question, which is, how seriously should we look upon judgements like that one as a matter that should concern us, as distinct from, in a certain sense, a matter which should reassure us that careful balancing is going on?

Mr. Anand: From my submission, you will see I do not share the view that it is a matter which is not of concern to us. The commission believes that the decision in the Bill 30 reference--and my intention here is not to cast doubt on that decision or to criticize it in any way, but rather to draw, I suppose in the legalistic way that is familiar to me from my former life, from the rationale of the two major judgements to the effect on the accord itself.

What I draw with respect to Madam Justice Wilson's judgement, as opposed to Mr. Justice Estey's, is that there was no balancing done in the Bill 30 case. If the court wished to balance, if Madam Justice Wilson wished to undertake a balancing process, she would have said, and I am paraphrasing obviously, that there is a right in the charter to freedom of religion and an equality right in section 15 relating to religion and other grounds and, on the other hand, we have this express provision, section 93 in the British North America Act.

How do we balance and resolve that concern? Madam Justice Wilson indeed said that separate school funding sits uncomfortably with the equality rights provisions but she found that she did not have to undertake the balancing that would otherwise take place because the fundamental compromise of Confederation was not intended to be limited in any way by the charter in 1982.

The balancing process, if it had occurred, would have been to say we have these rights: freedom of religion in section 2 and equality rights with respect to religion in section 15. On the other hand, we have section 93. Is it a reasonable limitation within the meaning of section 1 to provide a separate funding of separate schools? The conclusion may well have been the same--that it is a reasonable limitation on equality rights in the religious context and therefore the Ontario legislation, Bill 30, should be upheld--but that was not the balancing process which went into the exercise.

What I am saying in this context is that I thought, both in the legal sense and in the popular sense, that what happened when the first ministers spent that night together was a fundamental compromise, using the English language in its broadest sense. So it might well, since it is fitted into the Constitution Act, be seen as a fundamental compromise of Confederation and be used to exempt such rights from the balancing process.

What I am advocating is that the balancing process take place within the charter because you have all the tools available within the charter to carry it out. Just to use an example, the promotion and the preservation of bilingualism, which is, as I have indicated, a principle we wholeheartedly support, is one which can be accommodated within the meaning of the charter because the charter refers to equality on the basis of ethnic origin and has other equality rights in it which are used and can be used by linguistic



minorities to further their case. So the charter provides the tools that are necessary.

Mr. Allen: If one were to apply section 2, the "distinct society" clause, in the same way to one aspect of the current linguistic crisis in Quebec, namely, the sign question, would you consider that the minority had been abused if the resolution of the question by the Legislature of Quebec were to permit only lower-case English or other language inscriptions on signs that were upper-case French? Obviously they are being treated differently and the "distinct society" clause would say that this is a community which is principally French but also has a minority in the other official language. Some other groups may coattail on that a little bit in a multicultural sense, but is that the kind of judgement that you would be speaking of and would that be offensive?

Mr. Anand: Frankly, I am not sure of the answer to your specific question with respect to lower-case and upper-case language in signs. In coming forward on behalf of the Ontario Human Rights Commission, I leave it to Quebeckers to advocate and to resolve concerns of that kind within Quebec. Let me just say it is a classic example of different rights colliding: freedom of expression, multiculturalism to the extent that section 27 provides a right, equality on the basis of ethnic origin, and I am sure there are others which come together in a case such as this.

Our concern is not that that balancing will come out in one way or the other, whether it is by way of a compromise solution with upper-case and lower-case letters or something else. But it seems clear to me, and indeed the statements from the government of Quebec seem to back this up, that the "distinct society" clause would and should pre-empt that balancing process altogether. This would be a specific example of a situation where, if the accord were to override charter rights, you would never get into that balancing process because this would presumably be one of the flagship policies of a distinct society.

Mr. Allen: Can I then ask a final simple question, which is not so simple I suppose, but it asks for a fairly brief reply. Do I gather from your response to my first question that you are reasonably happy with a political constitutional situation in which both the courts and legislatures are equally involved in the question of the defence of rights and the application of those principles?

Mr. Anand: I am certainly happy with the situation in which they are both involved. I would hesitate to use the word "equally" because I am not sure how one gauges that. Apart from section 33 the courts have an override power, if you like. On the other hand, it is clear that the vast majority of citizens will be protected more by the legislatures than by the courts because that is the nature of the functions. Legislators such as yourselves are much better equipped in a comprehensive way to protect rights. I am certainly happy with the situation, generally speaking, that resulted from the charter which was that pure parliamentary sovereignty was ended.

1030

Mr. Chairman: Thank you very much. Before moving to Mr. Offer, if I could just note to the committee members, as well as to those who are going to be appearing before us this morning, we did get off to a somewhat later start than intended, and we are hoping that one of the groups that is to come at the end of the morning will come in the afternoon. That is just to assure everyone

that you will have a full time before the committee. We will move to our last question, Mr. Offer.

Mr. Offer: Thank you very much for your presentation. My question is a follow-up to one of the questions Mr. Allen asked, with respect to the analogy between the matter at hand and the Bill 30 case. I think you put the problem well and with some degree of clarity in your submission. The problem I personally have is, as I see the Bill 30 case, it seemed that the argument of some was that that there was an attempt to use one provision of the Constitution to nullify another provision of the Constitution vis-à-vis section 15 and section 19, which would have resulted in the nullification of the specific grant of power.

I am not going to talk about the interplay of section 29 at all. I believe that is an important section but I want to leave that aside because, if that is a fair characterization of Bill 30, the problem that I have in using that as an analogy to this matter at hand, where one takes into account the question of the accord, and specifically section 2 of the accord and its impact on some of the rights given in the charter, is that whereas in the Bill 30 case we were dealing with--and without question--specific rights, specific grants of powers, we are, in the analogy you put forward, dealing with, on one hand, rights but, on the other hand, clearly, interpretative provisions.

That is where I have a problem in appreciating the analogy. There is, on one hand, a comparison of right to right and in fact a provision, section 29, which comes into play, such as the Bill 30 case and, on the other hand, a comparison of interpretative provision as contained in the Meech Lake accord to right as contained in the Charter of Rights. I have a difficulty in fully appreciating how that is in many ways an example on all fours that should be used in our deliberation. I am wondering if you can help me out on that.

Mr. Anand: Let me say two things. First of all, with respect to the characterization of section 2 as an interpretative provision, I think in one sense that is true because it begins, "The Constitution of Canada shall be interpreted in a manner." In one sense that is true, but in another sense it is quite misleading because a provision that dictates how other parts of the Constitution are to be interpreted has very substantive effects.

To use an example, a provision that said, "In any dispute between the government and an individual as to whether the charter has been breached, the court shall decide in favour of the government," would be an interpretative provision. But it would have the most far-reaching and damaging effect, and certainly no one here would suggest that such a provision should be enacted. I do not readily adopt the dichotomy between a comparison of right to right and a comparison of right to interpretative provision.

My second point is that there is a fundamental principle of interpretation of constitutions or of laws that provisions are to be given meaning if at all possible. So the question becomes: What is the meaning of an interpretative provision if we accept section 2 as being that?

As I have stated at page 6 of the brief--I have read it and I will not read it again--there is not a direct grant of legislative powers, although when you go through the sections and by process of elimination, since one level of government cannot impinge on the other, it can only impinge on the charter so as to give effect to the Meech Lake interpretative powers. So what you have is effectively an enlargement of the rights given to government.



Certainly, if I were in the position of arguing on behalf of a government in defending a piece of legislation, I would first write the legislation in such a way that the preamble says it is designed to preserve a fundamental characteristic of Canada. I would not do that facetiously or in a colourable way, but in an appropriate sense. Then, when I got to court, I would say, "There is a provision that is expressly permitted by a constitutional interpretative provision."

Then we would fall within at least the Estey reasoning. Indeed, the Wilson reasoning is even looser than that, in the sense that all that is required is "a part of the fundamental compromise." As I have said earlier, I would have thought a persuasive argument can be made that what the first ministers did was to reach a fundamental compromise in order to achieve a laudable goal; that is, the bringing of Quebec into the Constitution.

In both of those senses, I see an analogy to the Bill 30 case.

Mr. Offer: If I may carry on with this for just a moment, it brings into play another section you talked about with respect to the whole question of the nonderogation clause. You indicated that it is clear that the wording of subsection 2(4) indicates no derogation from the powers of the legislatures or the government of Canada, but it follows that they can be increased and, if they are to be increased, it would be at the expense of some of the personal types of rights with respect to the charter.

If I recall correctly, it is interesting that Professor Hogg has used absolutely the same argument but does not stop there. He takes it to the next step, saying we have to take a look at this in its totality. Once you reach that point, it is not the end point, it is just a next point. Then you must take a look at it in terms of the charter, in terms of section 1, in terms of these particular sections being used as an interpretative aid in areas where there is uncertainty or vagueness, keeping in mind the whole question of section 1.

It is only then that you will appreciate the proper protections or the protections which will be afforded through the charter. It is not a matter of an interpretative section conveying rights. They by themselves stand alone. They do not convey any rights, but certainly in their interpretation can alter rights. There is no question about that either. But you cannot just stop there. You have to take a look at the charter and all of the sections and certainly the use of section 1, which has already been argued a number of times.

I am wondering if you have any comment with respect to your position on the nonderogation, stopping where you did, actually.

1040

Mr. Anand: It is at the further step that Professor Hogg takes that he and the others who participated in the drafting of these provisions are on the horns of a dilemma, it seems to me. Quebec and the other governments, in the first subsections of section 2, were given empty rights in the sense that they did not expand powers and did not do anything legal by recognizing the distinct society and the fundamental characteristics of Canada. In other words, either these provisions which we have all expended so much hot air and paper over have no meaning, or, if they have meaning, they have to take away from something else. They cannot take away from each other's level of authority so they must take away from the charter.

When you put those two together, logically, it seems to me, the premiers and the Prime Minister cannot say (a) "We have done something significant and substantive in enacting these new principles"--distinct society and fundamental characteristic--and (b) "We have not touched the charter." Those two are inconsistent logically and collide with one another. It is that further step that, as I say, Professor Hogg and the others who participated in the drafting of these provisions and subsequently got into the authorship enterprise have something of a dilemma. That is where I would disagree with them.

Mr. Chairman: Thank you and I apologize. I will make sure to put you first on the next list.

I think we could spend a great deal more time this morning reviewing other areas of your presentation. I am sorry to have to cut off the discussion at this point. We are most appreciative for your submission and for the answers to our questions. I think we will want to undoubtedly look at the various points that you have raised here in an extremely serious fashion. We thank you for coming.

Mr. Anand: Thank you very much for the opportunity.

Mr. Chairman: Then, if I might, I will upon our next witnesses, the representatives from the League for Human Rights of B'Nai Brith Canada: Simon Adler, the Ontario chairman, and Alan Shefman, the national director. If you would please come forward, gentlemen. So as not to cause further time problems, I will turn the floor over to you. If you would like to lead us through your brief, we will follow up with questions.

#### LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Mr. Shefman: Thank you very much. First, I would like to thank the committee for allowing us to make this presentation. I will be introducing our brief. My name is Alan Shefman. I am the national director of the League for Human Rights. Simon Adler is the Ontario chairman of the League for Human Rights. Simon will be presenting the substantive aspects of our brief. It is fairly lengthy. We will not be reading it. We will presenting some of the highlights to you.

First, I would like to give you an insight into what the League for Human Rights is. The league is a national agency dedicated to combating racism and bigotry. Established in 1970 by B'Nai Brith Canada, the league's objectives include striving for human rights for all Canadians, improving intercommunity relations and combating racial discrimination and preventing anti-semitism.

B'Nai Brith, the league's parent organization, is the world's largest and oldest international Jewish service organization. Founded in 1843 in the United States and established in Canada in 1875, its membership exceeds 500,000 men, women and youth. Today, there are over 10,000 Canadian Jewish families involved with B'Nai Brith Canada.

The league's work can be divided into four general areas: education, community relations, legal-legislative and public information and research. Within each of these categories, the league is involved in a wide range of issues and programs encompassing broadcasting, communication policy, legislative control of hate propaganda, religion in public schools, affirmative action, the use of the Charter of Rights, cross-cultural training



materials, holocaust education and awards programs for the Canadian media.

We are presenting here today for a number of reasons, because we believe it is our responsibility as a human rights agency to comment on such matters and because of our support for the Charter of Rights. Last week we presented to the Senate task force on the Meech Lake constitutional accord and the Yukon and the Northwest Territories.

Overall, we are supportive of an accord that would bring Quebec into the constitutional arrangement. We are, in fact, supportive of the concepts identified in the present document. At the same time, we have significant reservations about the wording and arrangements, as well as the omissions in the present document. We will be touching on immigration, multiculturalism, aboriginal rights and the primacy of the charter.

Mr. Adler: The purpose of being in front of you today is not in any way to suggest the scrapping of the accord, nor in any way to suggest that an accommodation with Quebec is not necessary. Of course it is necessary, and our suggestions here today are intended to try to provide some constructive criticism and to outline some changes which could be made to achieve, more effectively, in our opinion, the goals that the accord is intended to achieve.

As Mr. Shefman mentioned, I am not going to read the entire brief; rather, I would like to highlight some of our positions to you. I would like to begin with the immigration question.

The accord as such--and this is apart from the part of it referred to as the constitutional amendment--provides that agreements can be entered into between the government of Canada and the government of Quebec relating to immigration. Effectively, what is provided for by these agreements is that Quebec will be entitled to actually receive a number of immigrants equal to its proportional share on the basis of population, plus five per cent of the objective of immigrants set by the federal government. This comparison between actual immigrant bodies, as it were, and a projected number of immigrants creates a number of very severe and significant problems.

First, there is an obvious problem in the sense that the possibility exists that each and every province could negotiate an equivalent agreement. That is provided for explicitly in the accord. You would thus have the possibility of the federal government's being obligated to physically supply, as it were, one and a half times the number of immigrants who actually wanted to come to Canada.

Second, and of significant concern to the league, the provision as set up at present may well necessitate a reduction of immigration to other parts of the country. I hasten to add that in our view if Quebec, for whatever reason, wished to increase immigration to Quebec, not only is it perfectly entitled to do so, not only is that a perfectly justifiable aim of the province, but at present all of the legal background necessary to achieve that end exists in the Cullen-Couture agreement.

What we have is that historically Canada has received physically less than its target in terms of immigrants year after year. Typically also, the number of immigrants choosing to go to Quebec seemed to have been less than what its proportional share would normally be. My understanding is that the number of immigrants typically choosing Quebec has run around 16 per cent, whereas under this agreement, depending on how you analyse it, Quebec would be entitled to 20 per cent to 25 per cent.

The only way that the agreement can be complied with, given a physical shortage of bodies, is to limit the number of bodies going to places other than Quebec. This, I suggest and the league suggests, is an inappropriate response to the justifiable desire of Quebec to increase its population. Moreover, it is our view that a very significant distortion in immigration patterns may be achieved as a result of this provision.

#### 1050

Immigrants seem to come to Canada for, call it one of three definable reasons: one may be as refugees, one may be for family reunification and the third may be for economic reasons. None of those reasons is necessarily linked or in any way logically consistent with the pattern of immigration the accord seems to set up. Thus, you may find the situation that economics may dictate a need for immigrants somewhere other than Quebec, family reunification may dictate a choice by immigrants of a place other than Quebec, and perhaps the only group of immigrants who might be totally unconcerned as to where in Canada they might live would be refugees, which typically would be the smallest group, and even they would not necessarily always be totally unconcerned about where in Canada they would live.

Again, Quebec has, and may legally have, different requirements as to what immigrants are going to be accepted and not accepted, requirements differing from those of Canada. Canada is entitled, notwithstanding whatever Quebec wants, to require certain very minimal categories or certain very minimal characteristics to be met by a prospective immigrant, but beyond that, Quebec is entitled under the Cullen-Couture agreement to set up its own requirements.

This then adds to the reduction of flow of immigrants into Canada as a whole. If, first of all, in order to maintain the necessary numbers, immigrants are directed to Quebec, the first question then becomes, are they acceptable to Quebec? A person who says, "I want to come to Canada because I have family in Manitoba," or British Columbia or the territories, for example, is obviously going to be less desirable as an immigrant in Quebec than a person who says, "Yes, I wish to come to Quebec because that's where my family is."

We thus see a pattern of potential distortion of immigration as a result of the accord.

In the final analysis, the point which I wish to make is that, in the view of the league, the Cullen-Couture agreement provides all necessary and sufficient power to Quebec to encourage as much immigration as Quebec can handle. Where the problem arises is in an attempt to link the numbers coming into Quebec with the numbers going elsewhere, especially where the relative proportion is calculated by comparing apples and oranges.

That is the fundamental error or the fundamental flaw that the accord has. They are comparing the Quebec entitlement, which is in terms of actual bodies, if I can be slightly facetious, with a proposed target. Quebec is entitled to a certain number of bodies, calculated as a percentage of a proposed target which historically has not been reached. It would seem that this element of the accord would have built within it seeds of failure.

The next area which I would like to touch upon and talk about is the area of multiculturalism. The accord does indicate that it does not affect multiculturalism as dealt with or referred to in the charter, but as did our



previous speaker--and I am going to endeavour from here on in my submission not to repeat unduly what Mr. Anand said, because, essentially, our positions are on all fours. Essentially, with respect to his legal analysis of the interplay between the accord and the charter, the league is in complete agreement with his eloquently stated position.

The charter itself indicates that it is to be interpreted in such a way as to foster multiculturalism. The constitutional amendment portion of the accord indicates that the Constitution, which by definition includes the charter, is to be interpreted in a manner consistent with something which is not necessarily, but potentially, in direct conflict with multiculturalism.

Again, we need to go into a slightly hypothetical situation. The amendment as set out in paragraph 2--and I am referring specifically to subsection 2(1)--characterizes Canada as being, in a sense, of two characters. On the one hand, you have a primarily English-speaking population with a substantial French-speaking minority, and on the other hand you have a primarily French-speaking population with a substantial English-speaking minority. In that second characterization, there is the notion of distinctness, which is considered constitutionally relevant. How can those characterizations co-exist with the characterization that Canada is multicultural?

I cut the sentence off deliberately. The charter indicates, in section 27, that it is to be interpreted to foster the multicultural heritage of Canada. The constitutional amendment, in paragraph 2, ignores that heritage. I am not suggesting any sort of deliberate ignoring; I am not suggesting any sort of hidden agenda to change Canada from multiculturalism. I am suggesting probably nothing much more than a drafting error. But drafting errors have a habit of coming back to haunt nations later on, once matters come to be determined in the courts, as inevitably they would.

Let me just throw a hypothetical example at you. Let us assume for a moment that it was determined by a government of a province that in order to foster its particular nature, it wished to deliberately reinforce or promote the characteristics of its majority, even perhaps at the expense of a minority. One could think of this in terms of language; one could think of this in terms of religion. In the worst possible scenario, one could think of it in terms of voting rights. One could think of it in terms of choice of immigrants. There are any number of scenarios in which a government decision to affirmatively promote what it perceives as its provincial character could conflict with ideas that we have linked directly to multiculturalism.

The framework of the present amendment, as Mr. Anand said so well, is such that the court would have extreme difficulty in promoting multiculturalism at the expense of what the province indicated was its aim to promote its character consistent with section 2 of the amendment. I have used the word "province." Exactly the same argument would apply to the government of Canada. It could determine, for example, that in areas outside of Quebec preference should be given to English people and French people should be kept as a minority, because that is the recognized situation that the amendment seems to suggest.

I would hope that this issue would never arise, but we do not deal with constitutions on the assumption that they will never be put to the test. The Constitution exists, in a sense, out of a recognition that it may have to be put to the test.

The position of the league is that the recognition of multiculturalism should come squarely within subsection 2(1) of the amendment. That is, there should be, in some form, an explicit incorporation of section 27 into the amendment.

1100

Now I believe, if I recall correctly, that Mr. Allen asked Mr. Anand if the constitutional amendment should deal with the charter on a shopping list basis or if the relationship between the amendment and the charter should be dealt with on a macro level, let us call it, in the sense that the entire charter is referred to. I echo and join Mr. Anand's answer to that question.

Our criticism of the amendment on this level implies or, in a sense, is founded upon a belief that we are implicitly amending the charter. To select provisions out of the charter that are to be dealt with in the amendment specifically is to compound that problem in our view. If the charter needs amendment, and there have some very cogent arguments made to that end, that is something which should not be dealt with in the form of consideration of this present amendment.

This amendment should deal with the charter as it exists. The reason I focused on multiculturalism in section 27 is that my reading of the charter does suggest, not in so many words, that what the charter has done is elevate to multiculturalism as a principle in the same way, but not in the same phrasing, as this amendment elevates the distinct nature of Quebec, for example. So that specific, and perhaps only that one, might be dealt with separately. Far better would be the addition of a very simple phrase to this amendment. The simple phrase need say nothing more than, "Any legislation or any regulation or any action of any government in purported compliance with this amendment must also comply with the charter."

Let me throw you a hypothetical example. Again, I hope that such an example would never come to pass, but if the charter and the amendment cannot deal with the example, then we have a drafting flaw which must be corrected. The example I suggest is that the province of Quebec, for example, being concerned about a falling birth rate and perhaps a reduction of immigration, might pass a law simply saying that it is not accepting immigration from the rest of Canada. They might begin that law, as Mr. Anand suggested, by saying, "This is absolutely critical in order to maintain the distinct society which Quebec represents."

Let us be honest. What is that distinct society? That distinct society is a society which is primarily French-speaking, primarily, we might call it, of French origin, with a number of very substantial minorities. But we could envision a circumstance where, for example, the James Bay hydroelectric project and other economic and political developments might make Quebec a peculiarly attractive place within Canada in which to live.

As we have seen, for example, with immigration from Alberta to Ontario while the oil industry was having difficulties, there might be mass immigration from the rest of Canada generally to Quebec. The Quebec government might very legitimately be very concerned about what effect that immigration would have on its distinct society. It might say: "We've got to just simply stop it. We can't allow it because we can't maintain our distinct society."

If we look at subsection 2(3) of the proposed amendment, of the Constitution Amendment, 1987--it is actually in section 1 of the amendment



bill--"The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed," I want to focus on the word "role," because I think Mr. Anand did not emphasize that word and I think he might have found it a little bit easier to answer some of the questions that were posed to him. A role presupposes the ability to act. It is not necessary for that ability to act that it be mentioned specifically in section 91, or in this particular case, in section 92 of the 1867 act.

The courts, since 1867, have said that any government power conceivable must fall either at the federal level or at the provincial level. We do not need for today's purposes to assign a specific category under section 92 for it.

The underlying power is there. If they have a role to preserve their distinct society, then quite apart from the effect of the charter, this law I am proposing would be quite valid. It would be a valid law preventing immigration into Quebec. It would also appear to contravene section 6 of the charter, on its face. How do we resolve that question? I do not necessarily have an answer.

What concerns me is that an answer that might develop is the answer Mr. Anand, and incidentally the League for Human Rights of B'Nai Brith Canada and myself, read as having been given in the Bill 30 reference case, that because a constitutional element, if we might call it that, a constitutional provision, permits legislative activity that is dependent upon and has inherent within it distinctions contrary to the charter, which in effect cannot be employed without contravening the charter, the charter simply will not apply. It cannot apply because then, reading the Bill 30 case as I think it should properly be read, you would have the strange situation of one part of the Constitution contravening another part. Since the very beginning of the courts' review of statutes, and in particular of constitutions, it has been the rule that wherever possible you avoid that result. The court is to strive to achieve an interpretation of the two parts that does not result in repugnancy.

Therefore, the decision reached in the Bill 30 case may well, given the present drafting of the amendment, achieve the result that Quebec could simply prevent immigration from the rest of Canada, or a smaller province like New Brunswick or Prince Edward Island or Nova Scotia, for example, might prevent immigration from Quebec. That surely, I think, is not an intended objective.

I think surely it indicates nothing more significant or serious than a drafting error, but it is a drafting error which really must be addressed and must be dealt with.

This same problem with multiculturalism, in the view of the league, may be faced with respect to native Canadians and women, both of whom seem to be treated specifically in the charter. Why specific treatment in the charter was included may be an interesting question for speculation, but the answer is not really very important, to my mind. The fact is that there was specific treatment in the charter and no specific treatment in the amendment. This seems to create, again, the possibility of decisions by the court which would remove any effect or any consequence to the charter provisions in those specific cases.

I am getting very close to concluding and I wish to stress that the objective of recognizing Quebec's distinct and unique nature within the

Canadian federation is one that is wholeheartedly endorsed by the league. The fact that there may be, in connection with the promotion of that distinct position, the necessity of balancing group against individual rights or group rights against group rights, is also something which is inevitable and recognized, and not in and of itself to be feared or any matter of concern.

What is a concern is that, in the present setup of the legislative proposal, in the way the Constitution Amendment is drafted, that balancing process may not take place. It may not be reached.

1110

I think that if any one of us were to ask any of the persons who were involved in the creation of this document, "Are you trying to do away with the charter?" of course they would say no. If we were to ask them, "Do you foresee circumstances where it may be appropriate to balance what you are trying to do in the promotion of your distinct society or in the promotion of Canada as you see it with rights under the charter?" I think any thoughtful member would have said yes.

There may be circumstances where we do need to balance. There may be some steps in promotion of a distinct role or a distinct society that go too far, and there may be others which, although they nominally contravene what is considered to be a right, do not go so far as to say they should be prevented. The concern the League for Human Rights of B'Nai Brith Canada shares with Mr. Anand, who preceded me, is that this balancing procedure may well be forestalled, with the result that under the guise of promoting the objectives contained in section 2 as proposed, no reference will need to be taken to the charter.

The solution to this problem that seems most obvious is the one I have already suggested. We need do no more whatsoever than to say that the derivative action, whether it be legislation, regulation, policy, whatever, need comply with the charter. A simple phrase like that would, I think, eliminate the perceived problem. I suspect, and I do not think we will ever know, that this may have been what was behind the framers' intention when they put section 16 of the proposal in, thinking that all they needed to do was to approach two or three specific sections and they would adequately involve the charter in the process.

My submission and the reason I specifically chose that example is that you cannot achieve the involvement of the charter appropriately unless you involve the entire charter.

I thank you very much for this opportunity. Should you have any questions, I would be very pleased to try and address them.

Mr. Chairman: Thank you very much both for your comments and also for the brief which goes into more detail on those and other points. I think it is useful that, as it happens, our first two submissions this morning focus on rights. That helps perhaps to clarify some of the issues we are trying to deal with. We will begin the questioning with Mr. Breaugh.

Mr. Breaugh: I want to pursue a couple of areas with you. One is that most of us are now looking for some way to make the determination whether the charter is ruined by this accord.

I understand and appreciate the concerns many people have about this,



but I struggle with the notion that the Charter of Rights is eliminated, put out of business or ruined or whatever term people want, simply because I see the charter still standing. What I am trying to assess now is whether there was an attempt in the formulation of the Meech Lake accord to water it down somewhat or to accommodate other needs.

One of the things many people struggle with is the notion, and I believe it is true, that every time we pass a law of any kind we eliminate some rights for someone out there somewhere, and they always tell us about it. That, in essence, is the political judgement call that is made. When we set a speed limit, somebody always asks me: "Why did you do that? I am a perfectly competent driver. I can drive 150 kilometres now anywhere and you have eliminated my rights."

When we did the seatbelt law, I certainly heard a lot about, "Why in the world would you guys be interested in invading my privacy in my car?" So it is a very real political argument.

I have a little difficulty with the suggestion a number of groups have made now that this was done by accident. The process, I think, is a wrong one, and we have discussed that at some length, but it is rather hard to believe that there were accidents in this process. There may have only been 11 very tired men in the room, but we all know that outside the room there is a phalanx of others who draft these things for a living. Most of what is in the Meech Lake accord had been discussed for some time so there were not really a lot of surprises. If there were surprises, they may be in how these things were put together.

It strikes me, too, that it does not do us a lot of good to try and prognosticate on what a future Supreme Court decision will be. We do not know that. One of the agonies of politics is that when you draft the law and you pass it, it is embarrassing, but those damned courts do have a right to hold sessions and eminent people make rulings on the laws you pass.

I am really wondering, does it get down to the nut that somehow we ought to affirm that we all believe, that the Charter of Rights and Freedoms stands and is not taken apart by the Meech Lake accord, and let it go at that?

Mr. Adler: I am sure this committee will have heard and will continue to hear during the course of its proceedings a lot of rhetoric. I think you used phrases like the charter being "torn apart," "trashed," and such like. I certainly would not in any way join in the use of that rhetoric.

I would not say that the charter would become a spent force or irrelevant if the amendment is passed in its present form. What I am saying is that in one visible area we would have a great degree of uncertainty as to what the ultimate decision will be later on, and uncertainty, in and of itself, is a bad thing. There is going to be, as a matter of life, a certain amount of uncertainty. You, sir, referred to some in the sense that the Legislature passes the law and then loses control over what the courts do with it.

But there seem to be two approaches that could be taken with respect to this amendment at this time in order to totally eliminate the uncertainty. All one would need to do is either of what I advocated before, just simply state that the derivative legislation is subject to the charter, or simply say the charter does not apply to what we may do in furtherance of these objectives. I

would argue strongly against that approach on a political basis, but in a sense it is open to you to do it.

The present circumstance is one where the question is up in the air. Even if members of this committee, members of the Legislature in the House, all of the provinces, Parliament, the Prime Minister, everybody said, "We believe the charter is going to apply to anything done in furtherance of the Meech Lake accord," that could all be meaningless unless you take that belief and put it into the Meech Lake accord.

An example I will give to you of that problem relates to section 7 of the charter. It was always believed, and it was stated, I would think, virtually unanimously at the time of the passing and enactment of the charter, that section 7 was to ensure fair trials only, to ensure rights like the right to a fair trial and all that means, what are called, by lawyers, procedural rights.

But in fact section 7 gets to the Supreme Court of Canada in a case involving section 94 of the Motor Vehicle Act of British Columbia. There the Supreme Court said: "No, we are not limited to procedural rights, as you have defined them. We can do something that you would call substantive," speaking to lawyers before the court. The court went so far as to say explicitly that it was not bound by expressions of intention, belief or predictions which were not contained within the very document itself.

If you, sir, believe that the charter is going to remain unaffected by this amendment, if you believe I am mistaken in my view that we have a potentially very serious problem of conflict, then all I am saying to you is, for heaven's sake, say so. Then put it in the document itself so that the court cannot adopt an alternative position.

1120

Mr. Breaugh: Yes. Politicians are in hot water on this one, and I tend to agree we should all just find the words and stick it in there.

The problem is that for once politicians, especially people on the joint committee, got caught, I believe, for being too honest with people, for admitting publicly, maybe for the first time, that they could put whatever they want in here. The truth is that at some time a court will take whatever words we draft and interpret it as it sees fit. Even if we put in large type on the front of the Meech Lake accord, "The Charter of Rights is unaffected by this agreement," at some point in time someone will maintain the legal right to go to court and say, "Well, that's what it says, but here are the 95 reasons it doesn't apply to me." None of us ever thought that Manitoba would translate all of its laws into French because somebody got a traffic ticket in English, but that is precisely how it came about. So we are admitting this agreement to the process, and any law will be subjected to it.

Let me try to get to one other thing with you, because this is the difficult part, I think, for many of us really to speak with much certainty on. We have not had a Constitution in this country for very long, so a lot of what it means is new to us.

I, for one, would say that constitutions work well when you write it all down and you leave it alone for half a century and let the courts kind of decide and get the precedents out there. Then you can review with some certainty whether the Charter of Rights and Freedoms was really a good thing



or a bad thing. Many of the people I know now have different opinions on whether the charter is really hot stuff or not so hot.

We struggle with the idea that a constitutional right is basically something that is there for a minority. If you put this to a popular vote, the rest of the country is going to say, "That's not a problem; we don't need that," but for a small percentage of your population, they need a legal right. It is that legal right which very often makes critical decisions in their lives.

What we, as politicians, try to do is sort out where this makes sense and where it does not, so some of the problems in the accord are in the political sorting process.

If you want Quebec to be a distinct society, it will have to do some things which will be seen by some people as being an infringement on their rights. The three or four clauses that are in the current Canadian Constitution that do that, in my judgement anyway, have not been exercised a lot, but if governments across Canada decided to exercise "notwithstanding" clauses and all that kind of stuff regularly, there would be a lot of screaming. There is a balancing here. How do you do that? How do you go through that?

The wonderful irony that I thought of this morning is that here is a group of people before us with a long, distinguished record in Canada for human rights and discrimination cases that I could not join. You would have the good sense to exclude me, I am sure, but it is true that we have a number of organizations that have very distinguished records of protecting minority rights that, for example, a woman could not join, that a Catholic could not join, that a number of other minority groups would have trouble getting into. The other irony that struck me this morning is that there are other groups with not quite so noble a history that have come to exactly the same conclusion on this accord as you have. I must admit it is causing me to think carefully about what is going on here.

I would like to hear your rationale about minority rights and how you handle that, how you handle the judgement calls when you try to do something as noble as an affirmative action program which excludes another minority. Men are excluded by law from a lot of affirmative action programs, and we are not going to take it too much longer. Another three centuries and we will rebel.

Miss Roberts: We are giving you five.

Mr. Adler: At the time the repatriation of the Constitution, as it was then called, was under discussion back in 1981 and 1982, in a personal capacity only I submitted a brief arguing passionately that there should be no charter at all and that some issues ought to be left to the political marketplace. However, the nation, in its larger wisdom, decided that I was wrong and chose not to follow my advice, and that is critical. We have a charter, it exists and it has very much in it that is extremely positive. Every tool, whether it be the tool of democracy itself, can be used for appropriate ends and it can be used for inappropriate ends.

I have heard an extremely cogent argument made, for example, to say that one of the biggest beneficiaries under the charter is huge corporations. They are having a field day, according to some. They point to the Big M Drug Mart decision and the Hunter-Southam decision. Look at what is happening to the corporations. On the other hand, look at how the unions are being treated.

Look at the Dolphin Delivery case, for example, and any number of cases that say you can belong to a union but it cannot do anything for you. Like every tool, it has potential for appropriate use and inappropriate use. You can bang a nail with a hammer; you can also bang your thumb.

Bringing it back to our present situation and what is before us today, I emphasize both from my personal conviction, which arose out of saying originally there should be no charter, and from the position of the league that this balancing is absolutely critical. It must be allowed to take place.

We have a mechanism which may be flawed, and arguments are made that the charter ought to be amended. We have a mechanism which does that balancing; it does allow that balancing. It directs the legislatures to the issues which ought to be considered and, maybe unfortunately from the position of the legislatures, it then gives the court the chance to second-guess. None the less, it is an educative and functional instrument at both the legislative and the judicial levels.

The position that the league is taking, which I understand to be identical on this point to the position that the Ontario Human Rights Commission was taking in the voice of Mr. Anand earlier, is that it is critical that the balancing be allowed to exist. Under the present circumstances, there is great confusion as to whether balancing will take place in the future. If we are confused now, the question arises, why gamble on getting the right answer? Why do we not address the confusion now and try to prevent the wrong answer?

You can never be 100 per cent certain that any words you put down on paper are going to be interpreted by somebody else at a later stage in different circumstances in exactly the same way that you have intended, but you can try. That is what the Constitution is all about. Nobody guarantees success, but it is the attempt to lay down the parameters which are going to be relevant in the future. Of course, when the court goes off too far into the deep end, there is recourse: section 33, which I think you mentioned.

To come back again to our present situation, one of the processes that the court must follow if it perceives that the charter does apply, if we get over the first hurdle, is to ascertain whether there has been a breach of the charter. Let us assume that in some example, such as my section 6 example prohibiting immigration, a breach is found. Then the court enters into the balancing, properly speaking.

The first consideration that the court must enter into is, what is the purpose of this law that we are considering? The court is determining only whether the ends justify the means. That is what section 1 of the charter is really all about. In the Oakes case, which is laid out in Mr. Anand's submission in detail, the court sets out how you go about deciding whether the ends justify the means.

Our view is that the present drafting of the constitutional amendment distorts that consideration by seeming to emphasize particular ends at the expense of other ends, in effect saying that the Constitution of Canada shall be interpreted with respect to A, B and C, leaving D, E, F and G out in the cold, so to speak.

I do not suggest that it is possible to list in any document every consideration which ought to be taken into account, but we can have a very good start at it by, in effect, incorporating the considerations which were already laid out in the charter.



1130

I sympathize--and I think that is really all I can offer you with respect to the problem you have addressed--I sympathize with the feeling that legislators must feel, in a sense, this ability to be second-guessed at a time when you cannot answer back. But none the less it does exist and it was the legislators who chose it in the first place by enacting the charter. The advice and request that, in a sense, the population of Canada makes of you then is to ask you, to the best of human ability, to say what you mean and make it explicit in the very document that is under discussion.

Mr. Offer: I want to carry on with this line of questioning. I sense that you are asking for a certainty or a clarity in certain provisions of the accord which I do not think is achievable in the way in which you are asking. You are holding up the charter as meeting that type of objective.

I do not think as we sit here that we fully appreciate how the charter is going to be interpreted. You are asking for something in the accord in terms of its not affecting other areas. I do not think--and it is a personal feeling--that is what the Constitution ought to be. I do not think we should have an appendix to a Constitution outlining all of the different fact situations, all of the different variables. We are not going to do it. You know it is an impossibility. That is not what a Constitution is.

I think a Constitution is to provide, in many ways, a framework not only for courts; and it seems that we are always taking the position that it is how the courts are going to interpret. I think it provides a framework in many ways for us as legislators in dealing with legislation. We take the first look; we are the ones who talk about particular provincial laws, determine how we are going to vote, determine changes, and we are the ones who take that first look with respect to its role vis-à-vis the Constitution.

I wonder if you could just comment on that type of certainty that you are asking for in this accord and on using it as a reason against the accord, which is not there in the charter or, in many ways, in the Constitution.

Mr. Adler: There are a couple of points to make. The first point is that, while ideally I would like to see certainty, I agree with you that it is not achievable. I think I indicated to Mr. Breaugh that it is just not achievable. What is achievable, however, is clarification, an approach towards certainty.

The important point that I tried to make is that we have two areas of uncertainty at the moment, two areas which we can clearly define, in which we can clearly say we do not know what the courts should do, and they could do something we do not want. The first area is whether anything done in purportedly following the amendment is reviewable under the charter at all. The first question in my section 6 example is, can the court consider at all whether a law prohibiting immigration into a province is a contravention of section 6? That problem can be cured very easily. The problem of not knowing what the answer is can be cured very easily by simply indicating within the amendment that any derivative action has to comply with the terms of the charter.

The second problem is, assuming that the court does review the act in the light of the charter, what is the outcome of the balancing going to be? I do not for a moment suggest that we need to know, or can know at this time, what that answer is going to be in every conceivable circumstance. I would not

even try; I will not even try with respect to my section 6 example. What I think we need to do, though, is to look clearly at the kinds of criteria that the courts are going to consider and ensure that we give appropriate weight to the criteria. We may want to weigh some as more important than others or we may want to weigh them all equally.

In the specific example of multiculturalism, in light of what section 2 says, we do not know, I would suggest, what weight is intended to be given to what. For example, is multiculturalism to be treated as as important an end, as important a principle, as the idea of a distinct Quebec society, or is it less important?

I would think that, regardless of what the outcome of the application of the balancing will be to a particular fact situation, it should be well within the power of the appropriate legislatures, Parliament, provinces and governments to make that choice and to make it explicit: We want multiculturalism treated as being as important as the distinct society, or the distinct society as more important. But at present we just simply cannot know what that answer is, because we cannot know what the relationship between the amendment and the charter is and because of the fact that you are dealing, in a sense, with the left hand on one issue and with the right hand on the other issue. They are not on the same scales, let alone being weighed together. It is a clarification I am asking for, not certainty.

Mr. Shefman: On page 5 of our brief we say specifically in relation to immigration:

"The Constitution should be a document of principle drafted in clear and simple language accessible to all. It is the basic document of the country. It should speak to citizens of the country about what Canada is. When the Constitution becomes cluttered with a whole series of detailed technical," and we have an example here, "immigration agreements, the Constitution becomes trivialized. The value of the Constitution as a unifying symbol of Canada, an articulation of what Canada is, is lost when the Constitution becomes a litter bin of federal-provincial agreements."

That is our overriding interest in clarification.

Mr. Offer: As a follow-up--and I know that we are coming to the end; I can see the chairman looking at me with pleading eyes--I will just say that I am just not certain in my mind that that particular certainty, as you have explained it, is achievable or ought to be achievable, or that we should in many ways amend or scrap the accord on that basis. We have heard from others that to do that is the same thing as rejection.

Mr. Adler: Let me be perfectly clear. We are not suggesting in any way that there should be any consideration of scrapping the accord in total. That is just not on the agenda. What we are suggesting is that the wording might be tidied up a little bit to achieve certain objectives.

Again, let me just simply reinforce it. I can do no more than restate it. Certainty is not within the ball park. We cannot achieve certainty. I am not asking for certainty. I am suggesting only that we strive for clarification. Even that is never going to be absolutely perfect, but if you do not make the attempt, the suggestion we are making here today is that you are going to walk into problems and a number of people are going to be surprised by the result. That should not necessarily be the case.



Mr. Shefman: It was said earlier that many of the items that are in the accord in fact were well known before they were actually put down on paper. The concern we and, I am sure, many of the groups have is that when it was finally put down on paper, it was acted on quickly, drafted quickly and there it was. We are concerned that we would be absolutely tied to that document of the work that went on at that particular moment, when there is a tremendous amount of interest across the country, a tremendous amount of skill and intelligence that is reviewing what was drafted at that moment, and I think we can come up with a better document.

1140

Mr. Chairman: Thank you very much. Again, we could spend a great deal more time and I am only sorry, with all the presentations and briefs, that we cannot go even further. I think it has been extremely useful to the committee having you here this morning, as was the juxtaposition, as I said before, of the two presentations around similar questions and issues. We thank you very much for joining us.

Next, I will call upon the Women of Halton Action Movement and the two representatives, Bev LeFrançois and Karen Thompson. We want to welcome you to the hearing. We have the copy of your presentation. I appreciate your patience. I hope you found it as interesting as I and other members of the committee did. I introduced two people but I see there are four. If you would be good enough to introduce the members of the group, then I will turn the microphone over to you and we will follow up with questions.

#### WOMEN OF HALTON ACTION MOVEMENT

Ms. LeFrançois: Yes, I will do that.

Thank you for allowing us to come and speak with you today. After having the opportunity to sit and listen to the different delegations that have come before us, we realize perhaps the dilemma that the Meech Lake accord has put a lot of us in, and particularly this group. We certainly wish you well in looking at all the information that has been given to you.

I would also like to introduce myself. My name is Bev LeFrançois. Beside me is Karen Thompson. Karen and I will be giving the presentation, I the introduction and Karen the body. To my left is Kathy Mason, another member of the Women of Halton Action Movement, and to my right is Barbara Glover. Sitting behind us are nine other members of the Women of Halton Action Movement who have come to give us some support this morning.

I see on your committee Walt Elliot. You do not know this, but when WHAM first formed, you were the first person we ever lobbied.

Mr. Elliot: And the last.

Ms. LeFrançois: You were running for office, I believe, in 1981. We lobbied you on women's issues and then wrote your answers in the local paper.

Mr. Offer: A copy I wish you had today.

Mr. Chairman: We hope you will keep that testimony so we can see just where Mr. Elliot is.

Ms. LeFrançois: The Women of Halton Action Movement, WHAM, started

in 1980 over a common concern for the Constitution of Canada and the rights of women. The group consists of approximately 60 women of varied ages, educational backgrounds, politics and socioeconomic status who have joined together to lobby on local and national issues that will improve the status of women in Canada. WHAM is a member of the National Action Committee on the Status of Women and supports the lobbying efforts of this strong feminist network. WHAM is also a member group of Voice of Women.

Some of WHAM's lobbying activities have included: Mother's Day peace walks; a Father's Day peace festival; a submission to the Fraser committee on pornography; a submission to the Task Force on the Implementation of Midwifery in Ontario; all-candidates meetings to address election issues; letter lobbies on gender bias in the judiciary; revisions to the Criminal Code regarding abortion and pornography; changes to the Indian Act; pay equity; violence against women; homemakers' pensions; affirmative action, and free trade.

Noting our activities, you will be able to understand well why we feel it is our responsibility to meet before this body, as we believe that we exist in order to try to influence the government and the laws of our country.

WHAM is very concerned at this time about the impact that the Meech Lake accord will have on the future of all Canadians, particularly women. Our group was formed around the issue of ensuring that women's rights were entrenched in the Charter of Rights and Freedoms in 1982. Once again, we see the need to speak out to ensure that those rights are not eroded by amendments to the Constitution in the well-founded effort to bring Quebec into the Constitution.

WHAM is also concerned about the process that has been followed to bring about this major amendment to the Constitution. Not only have women been left out but so has a major portion of the country, the Yukon and the Northwest Territories. This represents, in our opinion, an offence to all Canadians to ignore the democratic process so fully.

Ms. Thompson: First, I will talk about rights. I recognize that we may be repeating ourselves but we feel it is worth one more time with feeling.

Women in Canada fought and won the inclusion of specific sections in the Charter of Rights and Freedoms which protect equality and forbid discrimination. We do not have to remind you of the large number of women who converged upon Ottawa when it became clear that equality for women was going to be overlooked by the all-male drafters of the charter. Following that experience, it is difficult to understand why the Meech Lake accord has been drafted in the way it has in sections 1 and 16.

Section 1 specifically recognizes the role of the Parliament of Canada and all provincial legislatures to preserve linguistic duality and the government of Quebec to preserve and promote the distinct society. In addition, section 16 states that native and multicultural rights are not affected by the accord amendments. In combination, these amendments form a very powerful force for moulding the rights that currently exist in the charter.

By specifically enumerating the native and multicultural rights, the drafters of the accord have set up a hierarchy of rights starting with linguistic rights at the top, followed by native and multicultural rights equally on the next lower level. Below that fall the rights enumerated in section 15 of the Charter of Rights and Freedoms. This leaves the issue of rights based on sex, religion, age, mental or physical disability on a lower level than those of language, native or multicultural rights.



Experience has demonstrated that the judiciary is very explicit in its interpretation of the charter. They will not consult transcripts or parliamentary reports to try to determine what legislative drafters meant by specific passages. They will look at the words as written and judge their weight. The only possible interpretation that they can give to the accord amendments as they stand today is that the rights of some take precedence over others. Those that are enumerated stand out as the more important ones.

We recognize fully that this was not the intention of the drafters. However, we also recognize that intention will not be interpreted by parliamentarians who want to cancel programs or redirect funding to other programs. The power of the words in sections 1 and 16 combined with the opting-out provisions of section 7 of the accord give the provinces the power to deny services to some Canadians. The recent controversy over what are provincial responsibilities to pay for abortions in the face of the Morgentaler decision is an example of the type of injustice that could become commonplace in Canada if the accord is allowed to stand as it is today. Courts as well will have to read the words as written, not as intended.

We believe that in the effort to persuade Quebec to enter into the signing of the Constitution, the drafters were hasty and have made glaring errors that should now be amended. The desire to have Quebec included in the Constitution is one that we applaud and fully support, but not at the expense of the rights of millions of other Canadians.

I would like to point out that we have chosen to address a couple of issues. We are aware there are a lot of things and a half hour does not allow us to address all of those. The next one we would like to talk about is the process.

We are honoured to be able to make this presentation to you today. It is a credit to the government of Ontario and to all three political parties that Ontarians have an opportunity to express themselves and to engage in a dialogue that will improve the constitutional amendment process in the future. We are concerned for the long-range plans for Canada and not for short-range, quick-fix solutions to complex problems.

As a result, we have great concerns that this process today not be used simply as a way to appease the public and as window-dressing. If these hearings are just for show and will not lead to any serious reconsideration of the flaws in the Meech Lake accord, then all three political parties must shoulder the blame for that failure. It is a serious mistake to leave out the Yukon and Northwest Territories in the process while drafting a document that could threaten their existence. The lack of consultation with the far north and with other groups in Canadian society, such as women, has led to serious drafting flaws in many areas.

If Quebec will accept the accord only as it is written today, what is the purpose of these hearings? Is the accord so fragile that amendments to make it more equitable will not even be considered? We suggest to you that if this is the case, the accord has no place in Canadian history and should be discarded.

1150

We recommend that the accord should be redrafted to ensure that the hierarchy of rights created by the current wording is removed. The redrafted version should be given to all provincial parliaments and to the Yukon and

Northwest Territories for consideration and approval. The public should be allowed the time and opportunity to comment on the contents of the proposals before they are voted upon in the various legislatures. The future of Canada as a nation, not as a union of separate provinces and territories, rests on the reassessment of the process that has occurred in this document.

In the Honourable Ian Scott's remarks to this committee on November 25, 1987, he urged us to keep in mind that the accord "cannot be analysed against some purely hypothetical or abstract alternative...it is not sufficient to ask whether there is an alternative set of proposals which might theoretically be superior to the accord as written." With respect to Mr. Scott, we remind him and you that all is theory until put into practice.

It has been stated theoretically that women are wrong to be concerned about the wording of the accord and that their rights are entrenched in the charter. However, experience has shown that words will be interpreted strictly as they are written and thus our concerns are not theoretical but are based upon very real experience. As time passes and people have an opportunity to study the words in the accord, opposition to it is mounting. You do not need to read anything more than one local paper to realize there are various groups, including the federal Liberal Party which has just had a conference, where there are a lot of people who are very concerned about the accord.

Why the rush to implement the accord? Important issues such as the Constitution, equality rights, the future of the Yukon and the Northwest Territories, federal-provincial relationships and national social programs deserve more time for critical examination and comment by all Canadians. The politicians of Ontario have an historic opportunity today to use their influence to ensure that this process is done correctly so that in another generation we may look back and feel confident that decisions regarding the accord were well thought out and equitable to all Canadians.

Thank you for this opportunity to share our opinions and concerns.

Mr. Chairman: Thank you. Let me just note that while you may well have touched on points that have been made before, as they say, repetition never hurts. It is fair to say at this juncture, I suppose, that we have probably heard, in terms of various groups, more women's organizations and groups than any other single area. Certainly your concerns and comments fit very securely into that whole discussion. It does not hurt to have those underlined again. I begin the questioning with Mr. Eves and Miss Roberts.

Mr. Eves: It is a pleasure to have you before the committee today, and I think some of your points are very well taken. At the top of page 3 of your brief you make the comment that, "The only possible interpretation that they can give to the accord amendments as they stand today is that the rights of some take precedence over others." You may or may not take heart from the fact that Morris Manning, whether you always agree with him or not, is of a similar interpretation and, of course, he appears before the Supreme Court of Canada on a regular basis about numerous matters on behalf of his clients.

We have had, it is fair to say, though, constitutional lawyers and experts who have argued on the other side. I am sure you are well aware of those arguments, that section 16 is merely an interpretative section and will have no real weight. There is, at the very least, some ambiguity there, and groups before you have made the same point. If there is some ambiguity, then why not clear it up?

If everybody really intends that everybody's rights under the Charter of



Rights and Freedoms supersede the Meech Lake accord, then why not just state that in a very simple, one-and-a-half-line amendment? That has been suggested to the federal joint committee and it may well be suggested again to this committee. I take it that is the position you are taking with respect to section 16, that you would like to see it amended to protect those rights.

Ms. Thompson: Our statement that the accord should be discarded is made from the point of view that, if there are no amendments to it, then we question the validity of this and the process. However, we do feel strongly that, with the number of comments you have had, an amendment could be made to say that we have protected the rights in the charter as they are originally written. We realize that by putting emphasis--

[Interruption]

Ms. Thompson: There is a concert going on.

Mr. Chairman: I apologize. It appears that there will be a band which, at the present time, is rehearsing and then is going to be playing. I think if we keep the door firmly closed, we can proceed through it. I apologize. I am afraid the Meech Lake committee has no authority over bands playing in the Legislature.

Ms. Thompson: We recognize that.

Mr. Eves: I wondered if that was some sort of musical interlude accompanying the Sergeant at Arms.

Ms. Thompson: We hired them.

We really are concerned that when you start segmenting out particular--I think we would be concerned the same as if they had said women's rights would be protected and would take more precedence and had left out all the rest of them. We are looking at it from the point of view that the charter has a history now, that there is an interpretation process beginning in terms of the judiciary and that, to lay this on top, then you start reinventing the judicial process of interpreting what section 16 means.

They cannot help but overlay this and say: "Why did these people pick on these three particular aspects? In picking on those, they obviously intended to mean something in the writing of them." The judges are not going to look at it and say: "This has no meaning. It is the same thing as it was before the charter." There was a very specific purpose in writing the accord and they are going to have to figure out what that was.

Mr. Eves: Mr. Manning and others quite agree with you. Assuming that no amendment is made to the charter by this committee or this Legislature for whatever reason and the majority of members decide not to entertain the idea of any amendment, would you be satisfied with a reference to the Ontario Court of Appeal to determine what the effect of section 16, as it is drafted in the accord now, has on the Charter of Rights? That has been suggested by many witnesses who have appeared before the committee.

Ms. Thompson: I think that is a second-rate solution to it. My concern is with the process, that we see that even though there are a lot of concerns, we would have to make references to them. Are you going to refer the entire accord?

Mr. Eves: No. They are only talking about--

Ms. Thompson: Equality rights. Are you going to refer all the points? That would be a problem. We could be in the courts for years referring every specific clause that was a problem and asking for judicial interpretation and then going back through the drafting process of changing it if the judges decide to do that.

Mr. Eves: That argument, of course, is only a legitimate argument if you think the only thing that needs to be amended in the accord is section 16 and where people's rights under the Charter of Rights and Freedoms stand. Are they affected or are they not affected? That is a fairly simple reference and it has been suggested by my colleague Mr. Breaugh and by several witnesses who have appeared before the committee. In fact, one of the very first who appeared before us, Professor Beverley Baines from Queen's, suggested that.

That leads me to my next question. Assuming that problem with section 16 could be solved to your satisfaction one way or another, by amendment or by court reference, are you still concerned about other areas? You mentioned the problems with the territories in regard to their ability to become provinces and their ability to nominate people to sit in the Canadian Senate or on the Supreme Court of Canada. Are there other areas that you think have to be addressed in the accord, so even if section 16 problems were resolved, you would still like to see other amendments? Or would you be happy in your own mind if section 16 problems were resolved?

Ms. LeFrançois: We have other concerns with the Meech Lake accord and, as we were saying, we have been aware that there have been many other groups coming before you, speaking of their particular interests, so we have been more or less focused. The fact that there was nobody represented from the Yukon or the Northwest Territories in the discussions in the very beginning--and I believe they were there and not allowed into the room at the Meech Lake discussions.

We all want this to happen. We want to have Québec in the Constitution. Because that is so important, are we going to be willing to change the Charter of Rights and Freedoms? We know that everybody really does not want to do that. It seems to me that a great mistake was made when they closed the doors and decided they were going to make decisions in one night, but these really affect the future of Canada.

1200

If we say we want more changes, and we see that changes are needed in every area, it almost seems that we are saying we do not care about Quebec being in the Constitution. We almost feel a little bit blackmailed because we do care. It just seemed that that weekend was unfortunate for Canada.

Mr. Eves: It is somewhat similar to the fact that everybody is supposed to have until June 2, 1990, to make up his mind but some premiers and some prime ministers want the matter resolved by June 30, 1988.

Ms. Thompson: One other comment we would like to make about it is--it is funny saying this to your provincial Legislature--the fact that it does give a lot of power; it decentralizes power. I think, with the problem that was addressed by the previous group about immigration with some selection, there are a lot of these things that concern me. The abortion issue is a particular one, considering the behaviour of some of the provincial parliaments, which we will not name, in terms of paying for services.



I think Canada has formed itself into a nation where we have certain socialistic types of programs where we ensure that we have good health care for all Canadians, not just for some who can pay for it. This is a real problem. I see this segmenting off according to what particular group happens to be in power in what particular province, and we will have less and less of these Canadian programs and there will be certain things happening and people will have to go on the immigration list, what is available in each province. It seems that we are setting up not a nation but just a group of economically associated provinces.

Who knows what happens to the Yukon and the Northwest Territories. They may blend into all the provinces that are bordering them. It is unfortunate that in the haste to get this thing together--I understand the pressure that politicians are under when they are in a room and they are saying, "We have to come out of here with an accord; if not, Quebec is going to walk"--you start putting things on paper and maybe the words are not the best by three or four in the morning. That is what we have ended up with here, something with a lot of good intentions but the wording has really failed to meet the needs of what was specifically needed to build a stronger federation.

The federation of provinces was to be made stronger by the inclusion of Quebec. I think that was the intention. The fact that Quebec was holding out was a big problem for us that left many of the federal politicians feeling very concerned that Quebec would end up leaving. The idea was that with a new politician there they had to make something happen and I think it is unfortunate that it has turned out in the particular wording that it has.

Mr. Eves: Thank you. Your presentation this morning has been a most sincere one. I would quite agree that there is no doubt that the 11 first ministers all entered into this discussion with the best of intentions, but I still do not see any reason why, if there are ambiguities in the accord the way it is currently drafted and we have until 1990 to ratify it, we do not avail ourselves of that time properly and perhaps improve upon the accord, if that is possible or even desired.

Ms. Thompson: That is what we are specifically recommending, that we not take it as it was originally written that night and cast it in stone. I have the unfortunate feeling, from what I have been following in the press and from talking to other groups, that it is cast in stone and that, to me, is a major problem.

Mr. Chairman: Before turning the mike over to Miss Roberts, I would just note that the clerk has signed an agreement with the band and it is not going to play until we are finished. I assume if we can do that, perhaps we can make sure that we can rectify the mistakes in Meech Lake as well.

Miss Roberts: That was certainly an excellent idea.

Mr. Offer: They played through your presentation.

Miss Roberts: I would like to add to my colleagues' comments and thank you for coming and for your presentation. I think, although you have said you are dealing with section 16, my reading of your presentation is one that deals basically with the process. You are saying the process was so wrong, no matter what came out of it is wrong. Looking at it now, you can see that you find problems with it. Even your comments today have indicated that the process is what you are concerned about; the process was not correct.

We are told by many experts, and I think Mr. Manning would agree with us as well, that there is nothing wrong with that process. It is what has been happening in Canada. It is the type of democratic process that has been in existence--and I emphasize the word "has." I think the development of the process that we see right now is something that is extremely new. The charter and the Constitution have just come into existence, and the process by which the Constitution came into existence was perhaps not as democratic as one would like.

You are asking on page 2 of your brief for a democratic process. We all want that. You have heard and you will hear many times that this committee is committed to making that process. Meech Lake does not occur. There are many things that may occur in the next two years or in the next two months in which Meech Lake will not occur, but we all know that something must be done to develop our Constitution and to involve all the known provinces as well as all other groups and all others concerned.

There has to be a process put in place that is going to do that. Have you thought about that and developed what you would consider to be an appropriate democratic process?

Ms. LeFrançois: May I say something about the process? I think in some ways the Meech Lake weekend was a little different in some way, just because when we brought in the Constitution in 1982 there was a huge uproar from women across Canada because we were not included. I think this is part of why we feel what has happened is undemocratic. It is because they cannot believe that the people who were involved did not take into consideration what had happened in the past.

There are people who have always spoken against these kinds of processes because we had been left out before. I think that is one of the reasons why we are all here today. As far as stopping that from happening in the future or having better processes in the future, I think we should have been consulted. Certainly, the Ad Hoc Committee of Women on the Constitution should have been consulted before.

Miss Roberts: By whom?

Ms. LeFrançois: Certainly by those 11 men, as far as I am concerned, who were there, and by the people who represent them. But the very fact that there was no consultation is just a way of saying the same old thing that was said to us before. It is not new. It is easy to consult with us. We are ready to consult at any time. A lot of us wait to be asked.

Ms. Mason: There was a suggestion of another group that perhaps the hearings could have been conducted first before it was cast in stone.

Miss Roberts: Basically, what you are saying is that Meech Lake should occur, then there would be hearings and it could be dealt with.

Ms. Mason: A draft and then hearings, then a final copy; a good copy.

Miss Roberts: That would satisfy you as a process. I am sorry, Mr. Chairman, for taking up time. You do not want a referendum, etc. You are just looking for a consultative process and somewhere down the road 12 men get together and sign that.

Ms. Thompson: I think the problem we feel very strongly about with



the Meech Lake accord was that it was issued as a final document. I know that is the difficulty that you as a committee have; that this is the final document. The fact that the Premier of New Brunswick is now not accepting it as a final document is causing a lot of consternation federally.

We would have preferred it to have been issued as a draft document and if Quebec had been willing to entertain amendments to it and consult about amendments to it. But there was that whole boiler sort of thing--people staying together in a room, making sure the words were put on the paper, and then we have got it. What we are saying is that that process in itself does leave out major groups in Canada. I think taking every issue individually it seems very minor but if you look at the whole accord, you can see the process has led to many problems. What we are saying is that as Canadians we do not feel that is a satisfactory way of amending the Constitution.

1210

Miss Roberts: Just one additional comment, very briefly: You always say Quebec. I think there are many other premiers who do not want to have a change. Quebec might be the easiest one to deal with.

Ms. LeFrançois: I think that is the one that is pointed out. Premier Bourassa is the person who is pointed out in the newspapers.

Miss Roberts: I know, but I would like to make it very clear that there are many other premiers who might be much stronger about changing anything in that than Quebec itself.

Ms. Thompson: Yes, we recognize that.

Miss Roberts: It is not just one.

Mr. Chairman: A final short, sharp question from Mr. Offer.

Mr. Offer: The chairman always says that. If you are the first person to ask the question, he will say that.

Mr. Chairman: It is because you always set such a good example for all the other questioners that I want to underline it.

Mr. Offer: That will not help you today.

One thing I want to ask, in fact the only thing I want to ask, is something that is not contained in this submission. Yes, I fully appreciate your concerns with respect to the question of section 16 not including women's rights, as you have indicated here. I am sure you are very well aware of the other arguments and the other positions and the other intentions that have been made that the multicultural concerns are not rights, but rather merely interpretive provisions; that where women's rights are indicated in section 28 of the charter, they are, at the very worst, either rights or a combination of right and interpretation; that there is section 15 in the charter, which deals with rights; that interpretation clauses sitting by themselves neither give nor take away rights, they are just merely used, where there are areas of vagueness or imprecision, as an aid to the courts.

One thing I want to do, though, is get your impression with respect to the whole question of your concerns in the reconciliation of Quebec now being part of Canada. The courts have said that yes, they have always been subject

to the Constitution and they have indeed used the "notwithstanding" clause of section 33. We are aware of that, but I would like to get your impression with respect to the import of having Quebec a signing partner in our Constitution, where from coast to coast to coast, we now have everyone part of this Constitution.

Ms. Thompson: We think it is very important that Quebec be part of the Constitution and that it signs this agreement in some form. We are not recommending this form. I think it gets back to the whole process and the way that what was put together was done. You can tell there was a thinking process going on in that room or why would they have not put in multicultural and native rights? Obviously, there were interest groups being represented by some of the premiers in that room as they were going through the process of "How can we put these words together?"

I think it is incredibly important that Quebec be included, but I think the process has to be in terms of a consultation where, in including them, we do not therefore jeopardize--and I say "jeopardize" because we do not know for certain that the courts will interpret anything in a particular way; that is one of the great things about the judiciary, that you cannot predict what any decision is going to be in advance and that you are going to end up with the possibility for great problems developing from the way the wording is today.

Mr. Offer: I just wanted to get your impression on the whole question of the national reconciliation.

Mr. Chairman: Given that you are going to present us with a copy of Mr. Elliot's answers to your 1981 questionnaire, I feel I must allow him the last word.

Mr. Elliot: I gave the chairman the nod that I really wanted to have the last word today. I apologize for not being more involved in the questioning, because I have been fighting a cold.

Having the last word, I would like to compliment your group on its sustained effort now for almost a decade. In particular, the emphasis on process that you have brought to the committee is very valuable because in the 250-odd briefs that we have heard or had submitted to us now, it is becoming very obvious that the process that was used in this particular accord is not acceptable.

My concluding remark would be to encourage you to continue your efforts, because I know you have been consistent and logical for almost a decade now in your efforts in things like commenting on the Meech Lake accord. I cannot help but believe that because of your reasoned approach, because of your involvement, large numbers of other groups now have the same kind of intent, so that the famous 11 are going to have to pay attention.

Whatever happens by way of constitutional amendment from this point on is going to be enhanced by your input, so I would like to thank you very much on behalf of the committee for coming. Keep up the good work.

Ms. LeFrançois: Thank you.

Mr. Chairman: I will now call upon representatives of the Liberal Women's Perspective Advisory Committee, Patricia Herdman, chairman; Gloria Pollock, vice-chairman; and Marilou McPhedran, adviser. Please come forward.



If I have given a name that does not apply, perhaps someone can clarify the record. I would like to welcome you this morning. I guess we are now sneaking into the early afternoon. You have given us a copy of your submission and that has been circulated. I will turn the mike over to you. Please proceed, and we will follow up with questions.

#### LIBERAL WOMEN'S PERSPECTIVE ADVISORY COMMITTEE

Ms. Pollock: On behalf of the Liberal Women's Perspective Advisory Committee, I would like to thank the committee for this opportunity to share our views on the Meech Lake accord.

The mandate of the Liberal Women's Advisory Committee is divided into two major areas, those of advising the provincial government on current issues and of encouraging women to participate in the political process. Since its inception, the committee has encouraged women across party lines to join in the discussion on current issues, to conduct comprehensive studies of those issues and to present the resulting briefs. Since 1982, the Liberal Women's Perspective Advisory Committee has presented briefs on pornography and censorship, midwifery, pension reform, family law reform, delivery of health services, child care and pay equity. Although we transcend party lines as a group, we sponsor and arrange the yearly Margaret Campbell Dinner, which raised \$40,000 last year for Liberal women candidates running in the past provincial election.

That tells you a little bit about us, and I am going to turn it over to our chairman.

Ms. Herdman: Thank you. I have handed copies of the brief to the clerk, and I am going to read our brief for the record. I would like, first, to provide you with our executive summary.

The Women's Perspective Advisory Committee believes that the Meech Lake accord is seriously flawed in such a way as to impede the growth of Canada as a nation and to put Canada at risk with respect to individual and equality rights.

Although we are concerned about a great number of provisions within the accord, we have focused on the five issues which are of gravest concern to our membership. Our concerns and recommendations can be summarized as follows:

1. The "distinct society" clause weakens the Charter of Rights and Freedoms. We propose that an amendment be made to ensure that all provisions within the accord be made subject to the Charter of Rights and Freedoms.

2. The provincial veto will militate against future constitutional amendments. We propose that the current amending formula be retained throughout all of the Constitution.

3. Canada's ability to provide national cost-shared programs is weakened by the opting-out provision. We encourage the federal government to actively support local and regional initiatives with respect to social, economic and environmental issues. However, we also believe that the federal government must retain the power to introduce and enforce national programs where necessary. We recommend that the accord be amended to ensure that the federal government retains its authority.

4. Our elected leaders must include, rather than exclude, Canadians from

the constitutional process. Women's Perspective maintains that Canadians must be actively encouraged to participate in the design and amendment of their Constitution before they can understand, protect and defend the foundation of this very privileged nation. We propose that this discussion be encouraged and expanded throughout Ontario and Canada and that the Constitution require such participation before these or any future amendments are ratified.

1220

Finally, members of the Ontario Legislature must be allowed to vote freely on the Meech Lake accord.

We request that each party leader ask his members to vote freely when the motion to ratify the Meech Lake accord is placed on the floor of the Ontario Legislature.

To give you more detail on our recommendations, the members of Liberal Women's Perspective Advisory Committee intend to add our voice to those who have already expressed concern over the accord in order to encourage the Ontario government to reconsider its position with respect to the proposed changes in our Constitution.

With respect to point 1, that the "distinct society" clause weakens the Charter of Rights and Freedoms, our members recognize that Canada enjoys a linguistic duality and that Quebec is a distinct society with respect to the province's strong French culture and language. We do not, however, accept that the Canadian Constitution and Charter of Rights and Freedoms, except the provisions on multiculturalism and aborigines, be interpreted in this context.

While defenders of the accord reassure us that the "distinct society" clause is only an interpretative clause, the report by the joint committee states: "These principles (duality and the 'distinct society') are more than merely preamble. They must in future be taken into account by the courts, along with other rules of interpretation, in arriving at a balanced understanding of the whole of our Constitution including the charter."

Indeed, there are many officials, including Mr. Bourassa and Mr. Rémillard, who are convinced that, combined with section 16, the "distinct society" clause gives the government and Legislature of Quebec power to override everything in the charter and Constitution except multiculturalism and provisions for the aborigines. Mr. Bourassa does not think that the "distinct society" clause is merely a principle of interpretation, but states "Quebec is winning one of the greatest political victories of its history."

Constitutional experts have a variety of opinions about the impact of the "distinct society" clause on the Charter of Rights. Some say that it may "tip the balance" in appeals made to the courts. Others reassure us that the courts will find a "compromise or balance between society and the law."

The members of Women's Perspective find such reassurances unacceptable. We are opposed to any provisions which may detract from the strength of our charter.

We are also concerned that our elected leaders are adding interpretative principles to the Constitution when the ink has barely dried on the equality provisions of the document. Equality-seeking groups have fought for many years



to have those provisions included in the charter and will not see them compromised.

But it is not only the equality rights that concern us. The charter also guarantees legal rights, democratic rights and mobility and language rights. All of these are weakened if the charter must be interpreted according to the "distinct society" clause. The price of this compromise is too high.

We understand that the joint committee has rejected the idea of exempting the charter from the effect of the "distinct society" clause for fear that this would mean the death of the Meech Lake accord. We believe this is mere speculation. The members of Women's Perspective expect that all the men who signed the accord will bring a fresh perspective to the document, given the significant public concern that has been expressed about their first draft.

We would like to re-emphasize that we propose an amendment be made to ensure that all provisions in the accord be made subject to the Charter of Rights and Freedoms.

With respect to point 2, that the provincial veto will mitigate against future constitutional amendments, the veto power granted to each province will ensure that future amendments made to certain areas of the Constitution will be very difficult to obtain. This is unacceptable, given the rapidly changing social, ethnic and economic fabric of Canada.

The requirement for consensus also violates a basic principle of democracy. Since every province will have a veto on certain future changes, Prince Edward Island with a population of 128,000 will have as strong a voice as all the residents of Ontario. Meech Lake has introduced a new idea to Canada, that of one person-40 votes, compared to the Ontario voting number.

The federal government will lose its power to ensure that a national perspective prevails in certain areas; again, leaving out the Northwest Territories and the Yukon. The consensus provision ensures that future discussions on the Constitution can turn into bartering sessions among the provinces. One province will be able to argue for more fishing rights before it agrees to amendments and another can insist on the right to extra-bill before offering support.

The amending formula is particularly offensive to the residents of the Yukon and the Northwest Territories. Northerners were excluded from the discussion that led to the accord and their aspirations to gain provincial status are thwarted by the proposed amending formula.

The veto provisions of the accord also ensure that the provinces must agree to a proposed Senate reform package. The members of Women's Perspective are very concerned that this will mitigate against or at least delay this much-needed reform.

Women's Perspective asserts that nations are built through strong democratic leadership, not the abrogation of leadership through consensus. We propose that the present amending formula be retained to ensure broad participation in constitutional change without the limitations and inequities of consensus.

The third point is that Canada's ability to provide national cost-shared programs is weakened by the opting-out provision.

Under the present Constitution, the federal government has the authority to introduce cost-shared programs such as medical care, hospital care, higher education and transportation and to require the provinces to administer these programs according to nationally established standards or principles.

The accord now allows the provinces to argue for reasonable compensation from the federal treasury, provided the province introduces a program or initiative that is "compatible with the national objectives." The terms "initiative," "compatible" and "national objectives" are relatively vague compared to the present requirement to meet standards.

The members of Women's Perspective appreciate the value of local and regional initiatives and would encourage the federal government to continue to support such initiatives, but we find it unacceptable that our federal representatives would agree to give away their powers and responsibilities so completely with respect to cost-shared programs.

Women's Perspective believes that strong federal programs are necessary to provide equality of opportunity and services across Canada. Canadians must continue to enjoy uniform health care, unemployment benefits and pension benefits across the nation. These programs must not be negotiable.

The federal government must retain the power to introduce strong national programs where further discussion and experimentation is no longer warranted. A province should not be allowed to choose further research as a means of dealing with a problem such as acid rain rather than introducing technological controls, nor should it be able to choose extra billing as a means of administering its health care program.

We also believe that it is necessary to provide a common thread of programs and services in order to sustain a sense of nationhood. Canada is not merely a patchquilt of provinces. We must be, and be perceived as being, a nation with a common identity.

We recommend that the accord be amended to ensure that the federal government retain the power to introduce and protect national programs, where necessary, in order to provide equality of opportunity to all Canadians, to create a sense of nationhood and to deal with matters of social, environmental and economic urgency.

Point 4 is that our elected leaders must include rather than exclude Canadians from the constitutional process.

In isolation, 11 men chose to make significant changes to the Canadian Constitution. Since then, elected officials have hesitated to express their views on the accord because of loyalty to their respective political parties. A sense of inevitability has limited discussion of the accord among the general public. The report of a federal joint committee did little to reassure Canadians that their opinions would influence the decisions of their elected leaders.

Women's Perspective maintains that Canadians must be actively encouraged to participate in the design and amendment of their Constitution before they can understand, protect and defend the foundations of our very privileged nation. This is particularly important in the case of our native people, who



have been overlooked in the present amendment process. Their future exclusion has also been guaranteed through the consensus requirement when designing the agenda for the first ministers' meeting.

The executive federalism introduced through the design of the accord and the institutionalization of annual first ministers' meetings is totally unacceptable to Women's Perspective. This exclusivity has prevented participation of women, natives and other minorities in Canada. It also promises to ensure future exclusion.

We propose that participation in present and future amendments to the Constitution be encouraged and expanded throughout Ontario and Canada. We further recommend that the Constitution require such participation before amendments are ratified.

Finally, point 5, members of the Ontario Legislature must be allowed to vote freely on the Meech Lake accord.

Women's Perspective asserts that the best decision on Meech Lake will be made only if each elected member is genuinely free to express his or her vision for Canada. We request, therefore, that the Premier of Ontario and the leader of each party encourage the free expression of both concern about and support for the accord prior to the vote in the Legislature. We also request that each leader encourage his members to vote freely when the motion is placed on the floor of the Ontario Legislature.

1230

Mr. Chairman: Thank you very much for your brief and for the specific recommendations you make. I think it speaks for itself in that sense and we will move right into questions.

Mr. Offer: Thank you for your presentation. You have touched on some very important points, which I know that you know have been approached in the past, but I really want to zero in on one particular aspect of your presentation. It has to do with national cost-shared programs and the whole question of the amendment, section 106A.

I ask you this because your particular organization has presented briefs with respect to different provincial issues, such as midwifery, pension reforms, pay equity and others. I would like to get your impression as to the reasons you find it unacceptable that federal representatives would agree to give away their powers and responsibilities, when section 106A really does talk about only things within exclusive provincial jurisdiction. It does not talk about jurisdiction which is exclusively federal, but only about that which is exclusively provincial. In fact, it has been argued that this is the constitutionalization of the federal government's being able to enter into such programs.

What I would like to get is your perspective on this portion of your brief, especially because of the work you do with both levels of government in the presentation of briefs. I think it is extremely important to hear your sense of how this will impact.

Ms. Herdman: It ties in, in that they are cost-shared programs. The federal government says to the provincial governments, "We will share these costs with you provided certain standards are met." For example, in health care, as you know, one of the standards the federal government chose to

implement was that it would withhold certain funds for every dollar extra-billed by the physicians. Therefore, Ontario's coffers had fewer and fewer dollars coming in, and finally the Liberals of Ontario managed to put through the ban on extra billing. That prompting from the federal government earlier on was what helped us towards our goal.

As we know, Alberta still allows extra billing. The federal government's retaining its right to exercise control over the expenditure of its dollars is what we are asking for now. Every province is handled differently by the federal government, given regional disparities. None the less, as the bottom line in times of crisis, the federal government has that power to intercede in certain provincial exercises when there is a federal cost-shared program. That is where we are concerned. We are not saying the federal government has to be involved in every provincial decision, but in time of crisis or in time of incorrect interpretation of the spending of the dollars, the federal government still maintains that control.

If we get into a situation where all across Canada, for example, we decide we are going to ban acid rain and really implement programs whereby we are going to have clean air and clean lakes and live lakes, we can see the federal government perhaps coming up with cost-shared programs where suddenly--pick a province--Saskatchewan decides that with its umpteen million dollars it is going to study acid rain towards meeting the national objective of reducing acid rain, as opposed to Ontario which decides it is going to put in technological solutions, that this is how it is going to spend its money.

We have watched the United States study the issue for ever. We do not have control over that, of course, but it is the same idea, the same concern. "National objectives" is a bit too big for us.

Mr. Offer: I understand that part of your response on the basis of national objectives. I must say I am still not clear how the federal government loses powers. I do not think it does. I think that in many ways they have been strengthened.

If I can just carry on about your perspective, I believe that when all is said and done, section 106A will allow the federal government to introduce a national program that is within provincial jurisdiction. That will be constitutionally OK. It is now going to give the right to the province to either go ahead with that program or opt out and provide a similar type of program.

Carrying it on, I think that provides a flexibility to provincial governments to meet, if they wish, the particular demands of their provinces, certainly in terms of child care and things of that nature. There are differences from province to province. The stresses on the systems are different; there is no denying that. In fact, within provinces there are differences.

I just do not see the real difficulty in giving the federal government the constitutional power to enter into these programs, as well as giving the provinces the flexibility to either adhere to the program or, if they want to implement their own programs, to do so with compensation so that in a very real sense they can meet the needs of the people of their provinces. I would like to get your thoughts on that because of the work you have done in the past, and I trust will do in the future, on so many issues. The pay equity issue, I know, is one and so is pension reform. Does this not give groups like



yourselves more of a flexibility in terms of presenting briefs and lobbying and things of this nature?

Ms. Herdman: The clarity is the problem we are talking about. I think you have heard that all--I do not know how many weeks this has been going on, but it is clarity. Let us give the example of child care. Let us say that Canadians say, "We want to finally provide Canadians with adequate child care." We are finding there are a lot of crises in child care from about four months to the first two years, until children are typically out of diapers. That is a really hard space for which to find child care for most women and families.

Let us say now that the federal program says, "The national objective is to provide child care facilities and assistance to families." Meeting a national objective of providing child care, we could see one province decide to provide child care from the ages of eight to 15 because that is the cheapest it can provide; it can get the most out of the funds for that process. Another province could decide to provide it from five to 10. We have quite a disparity, not necessarily meeting the needs of Canadians as a whole or even of a region, but maybe because it is the least expensive out, especially if it is a cost-shared program and the choice is not to provide funds from the provincial coffers for it.

Perhaps the federal government says: "Look, we want child care from four months or two months, little people, to the age of 10. That is our national standard. You have to meet it and then you get the dollars. That is meeting it." Then the province can use the dollars in whatever way it wants once it gets it, and it can use it creatively, as long as the national standard and principle has been met, providing it for little babies straight through age 10. That is where our area of concern is. It is not clear. We can find provinces providing services to families in really vastly different ways and not necessarily meeting the needs of those people.

Mr. Offer: Just as a final summation--I can see the Chairman looking at me.

Ms. Herdman: I know everyone is hungry for lunch.

Mr. Offer: You want to use the word "standard," or something other than "objective"--

Ms. Herdman: That is right.

Mr. Offer: --so that there will be more of a specificity, and take away a flexibility on the part of the province.

Ms. McPhedran: May I just quickly add to that.

Mr. Offer: Sure.

Ms. McPhedran: I think the clarity issue is addressed well by having the kind of basic criteria specified the way they were, for example, in the Canada Health Act. The principles are so clearly enunciated that you can measure almost any program against those basic principles, and when they are met, you have a program that addresses the reality of the daily lives of women and children in this country.

1240

Mr. Harris: I just wanted to zero in on the same section, following up on Mr. Offer's comments. Let me first say that, being a little critical of what you are saying in that section, I agree with you on the others. I am not taking exception to those.

I do not want to belabour the point on the Canada Health Act, when you talked about the specificity of withholding money. I do not think that particular principle is one which is held up, because we save \$50 million and it has cost us \$500 million, but it was the principle. I accept that is what was there.

With your example of the environment, for instance, environment is not an exclusive provincial responsibility. There is nothing to stop the federal government's say on any program it wants at any time on the environment. I do not see that example as being a problem, at least in my understanding of what is exclusive provincial responsibility.

What it has stated, you have said, is "relatively vague compared to the present requirement to meet standards." There is no present requirement. There is nothing in the Constitution that talks about allowing the federal government to come in and tell the province what it is going to do in its own exclusive jurisdiction. There is nothing. So this is a step forward, and many groups have acknowledged that this is a major step forward.

Provinces are acknowledging: "Yes, you can come into our domain. Yes, you can become involved. The only thing we ask is that if, in our province, we can come up with a program which will meet and be compatible with your national objectives and deliver it ourselves, then we will ask for our share of the money we would ordinarily get to do it."

Everybody is playing with words. If your day care example was used, if you are going to be compatible with the national objectives and the federal government says you must provide day care for infants from four months to two years, I do not see any way a province can say our program is compatible if we are not doing that.

Ms. McPhedran: We agree. You are not disagreeing with the point Ms. Herdman made.

Mr. Harris: I am saying Meech covers that point. The argument is going to come down to the case of the federal government saying, "This is what we want you to do," and the province saying, "We're delivering program B and we're doing it ourselves," and they cannot resolve it. Meech only kicks in when somebody goes to the courts and says: "You're into our responsibility. We do have a program we think is compatible with your objectives." You are going to have to go to court to decide whether that is the case.

Ms. Herdman: And play with the word "objectives." We are talking about playing with the words. The word "objectives" is much more vague than "standards" or "principles." An objective, to me, is often just a one-sentence objective: "Our objective is to finish the complete program." That can be one sentence. Standards and principles generally go on for pages and pages. That is more detailed and ties people more closely to the common goal.

Ms. McPhedran: The two operative phrases in the Meech Lake accord in this area would probably be considered to be "national objectives" and



"compatible." They are not principles that this organization is arguing with at all. The problem is with the lack of clarity. There is a great deal of room for a province to define for itself meeting a national objective and something that is compatible, which does not truly address the needs of the women and children that program is supposed to be serving. Without greater clarity, you will have an agreement in the abstract and a failure to deliver the service and to really affect the daily lives of the citizens we are talking about.

Mr. Harris: Quite frankly, I totally disagree with you and all those who say this will not work. Again, I use the term "mean-spirited," which I used with another group. You are assuming there is going to be some mean-spirited Premier who is going to be able to pull the wool over the eyes of the federal government, pull the wool over the eyes of the court and sneak this money and do something else with it. For the life of me, if that is going to happen, no Constitution is going to solve that problem. I do not see it.

Anyway, I will pass it on. I know your time is limited.

Mr. Allen: I am afraid I have a caucus meeting in 15 minutes so I am not going to--

Mr. Chairman: We also have a band concert.

Mr. Allen: Other things are calling, obviously, and I regret that, because it would be nice to spend some time over some of the points. I appreciate the concerns that you bring. I think it is fair for us to give you our reactions the way Mr. Harris has just done. We have been going through this, and our sense is emerging in one way or another on a number of these questions. Without expanding on the point, I have to say that I pretty well concur with what he has just said.

There is presently in the Constitution no authority to introduce cost-shared programs as such. There is spending power, in so many words, and that is all. There are powers that are exclusive between the two levels of government. At the moment, we have certain negotiated ways of doing things around that impediment in the Constitution, so we do not have any language that tells us anything about standards or compatibilities or any of that stuff; it is just not there. What we have in Meech Lake is some language that requires some minimum terms of reference.

The Canadian Council for Social Development, for example, gave us a long presentation in Ottawa. They said that their reading of "national objectives" was that it could include all the things you are referring to. They gave us four major points with substantial paragraphs indicating how that can be spelled out. Frankly, the fact that we got the Canada assistance plan, the Canada Health Act and a whole lot of other cost-shared programs without any language at all leaves me reasonably hopeful that with a somewhat better formulation than we have had in the past, some indication that there is such a thing as spending power that can intrude on exclusive provincial jurisdiction, which would have been a major court battle in the past, now you will not have a court battle over that.

There is new strength in this document. That is why I have some difficulty in accepting your first premise, which is that it really is badly flawed and will put Canada at risk. I do not personally, after all these weeks, really accept that. I think it is important to be just a little bit more discreet in the language one uses.

I know you are engaged in a significant debate within your own party

about how you are going to position yourselves around this. We will have some dialogue in our party, and Mr. Harris will too, around many of these points. But it is not quite fair to the document, under the veto amendments, for example, to give the impression that all amendments to the Constitution are not going to be under the veto principle. That is not true.

Ms. Herdman: Actually, I agree with you. I tried to change my wording as I was reading the brief, because only in the past day has it been better clarified. I understand that. None the less, it sets a dangerous precedent by permitting a veto within the constitutional process. I still feel it sets a dangerous precedent and so do the members of our committee.

Mr. Allen: But you see, that is at least a reasonable, arguable proposition from the items that it does refer to, because it does not talk about the possibility of vetoing the Canada Health Act or an unemployment insurance transfer.

Ms. Herdman: No. That is right, exactly.

Mr. Allen: It does have to do with federal institutions. We have had the point strongly made to us by people very much involved in these kinds of concerns that it is precisely the smaller, the poorer and the weaker provinces that need protection under the question of amending federal institutions. They are the ones that are going to be most dramatically impacted.

Whatever happens in the Constitution, Ontario is going to make out all right, thank you. Quebec will not do too badly. British Columbia will be OK. But by golly, in Prince Edward Island, New Brunswick and Saskatchewan, life can be pretty dicey with some of those big players around. If one is going to say that Quebec or any other province has some significant concerns with regard to a veto and if it is limited to federal institutions, then presumably those smaller provinces ought to have their say at that point in time.

1250

There is something inherently reasonable about that. We are not at that point just talking about voting practices where we would like representation by population and so on. We are talking about the big, principal structures under which we live, day in and day out, the Parliament of Canada, the Senate, the Supreme Court and items like that.

If Supreme Court decisions are going to be tilted one way or another against each of the provinces equally--they will all go in and go head to head with the federal government on this, that or another thing--then they ought to have their veto under any significant change that would change the rules of the game. Do you not think that is fair and reasonable?

Ms. Herdman: No. I do not think it is unfair to have small provinces having a voice in government, but we have also left out the territories and the people of the territories. By allowing the smaller provinces and the weaker provinces, as you phrased it, to have a veto power, we have effectively excluded the people of the north.

Mr. Allen: You say we have left them out. They were never in in the way the other provinces were. The other provinces historically had a kind of veto, because every time you went to Westminster the question was asked, "Are all the provinces on side?" The federal government would have to say, "No, they're not." Then they would say: "Goodbye, thanks. Come back when they all



are." At that point in time and at present the territories have exactly the same status. I would argue more on their behalf, but at least that much is true; they have exactly the same status. They are represented in those discussions through the federal government.

The federal government may, in turn, as it has in the last year or two, devolve significant powers on the territories in such a way as to make them virtual provinces. At that point in time it would be very difficult, I think, for other provinces to reject the fact that they virtually were and now should be. I do not think that the road has been cut off and blockaded as far as the territories are concerned and I certainly would not turn down reintegrating Quebec into the Constitution on a matter quite so hypothetical as that.

Ms. Herdman: I read the briefs by the Northwest Territories and I know they feel that they have been somewhat betrayed.

Mr. Allen: Certainly.

Ms. Herdman: They had to go through the degrading process of presenting to another voice of government because they could not be heard through their own avenues. I feel it was a betrayal of trust to the people of the Yukon and the Northwest Territories. As a Canadian citizen, it is very conceivable I might live up there some time myself. I do not like the snow but I could be living up there at any time. We seem to feel that once in Ontario, always in Ontario. I am talking as a Canadian citizen. I could live anywhere in this country, hopefully, and have the rights and freedoms that we hope to protect.

To summarize, I think it was a betrayal of trust not to have the people of the Yukon represented fairly.

Mr. Allen: You are not saying that the charter does not apply or the Canada Health Act does not apply or all the rest. What we are talking about is participation in a specific question of the future of the Northwest Territories in terms of whether they become or do not become provinces. That is an important question. I do not think Meech Lake precludes dealing with that. It just has not been included in this round. Is that not true?

Ms. Herdman: My understanding is that the veto powers to change government processes exclude the Yukon and Northwest Territories from being able to have a voice in their possible provincehood. They have made that concern fairly clear themselves, so I do not have to do that for them, but all of that brings us to the concern that we have. We feel that the voices of Canadian people have not been heard fairly.

Mr. Allen: I would just submit to you that in the scales of balance, that may or may not be the biggest ticket item at the moment, but there is another route for them with respect to provincehood. It is quite realizable, I do not think that the gate has been closed--that is what I am trying to say--and I think that one should at least be aware of that when one uses the argument of provincial veto with respect to new provinces.

Miss Roberts: Thank you, ladies, for your presentation and for the well-laid-out four or five points that you are concerned about. Your last comment, in which you just indicated that the voice of the Canadian people has not been heard fairly, seems to summarize everything you have said in your brief. You feel that the Canadian people have not been heard fairly.

If your interpretation of the Meech Lake accord is true, that the



provincial governments are gaining so much and the federal government has lost so much and that it will fractionalize and cause many problems, if that indeed is true, then one would have to question just exactly how your recommendation of a free vote in the provincial legislatures across Canada is going to help. How are you going to make Meech Lake fair if you have Ontario have a free vote or New Brunswick have a free vote?

I do not think the free vote will legitimize a document you say is bad. A free vote may, indeed, guarantee that we, as provincial legislatures, are going to say, if indeed what you are saying is right: "This is the best possible deal. We, as provinces, are gaining so much." Why on earth would anybody in any party turn it down on a provincial basis. A free vote in a Legislature may destroy what you are trying to do. I think there might be a better--

Ms. Herdman: We know it is very hard to find a genuinely free vote anywhere in Canada. We all have parties and we support them. But I think we have asked that MPPs vote with their conscience.

Miss Roberts: That is what you are asking me.

Ms. Herdman: While maybe it works for provinces--is this not great for our little province or our big province--is it good for Canada? They have to think now in terms of Canada. We are talking about the Meech Lake accord which affects Canada as a whole. That is what we are asking for. We do not say it naively. We know the reality of politics.

Miss Roberts: I am not talking about the reality of politics. I am saying that if your interpretation of the accord is right, a free vote in a provincial parliament is going to go for the accord.

Ms. Herdman: When we asked for that, we thought at the time, if it was a genuinely free vote and not one tomorrow, so people did not have a chance to lobby and call their MPP, if there was a free vote at some point in the future, then people could actively voice their concerns to their elected representatives who are there to represent us.

Ms. McPhedran: It is a question of focus. At this point in time, you have every major party leader, with the exception of a very courageous one in New Brunswick, saying very clearly to his followers, "You must follow the commitment that was made behind closed doors by 11 men in the early hours of the morning on a weekend." The shift in focus comes when, instead, they are freed from that obligation and they must turn to the people who voted for them and enter into a dialogue before they cast their vote and hear truly what Canadian people feel.

Miss Roberts: OK. That is your process for Constitution-building, that each Legislature would have a free vote--

Ms. Herdman: Actually, it is not.

Miss Roberts: --or is this your process of dealing with Meech Lake?

Ms. Herdman: It is our process of dealing with Meech Lake. We think strongly that a royal commission should be struck to find out from the Canadian people how to do this right.

Miss Roberts: A royal commission with respect to procedure and process.

Ms. Herdman: That is right. We do not have quick answers for that but we are trying to quickly answer Meech Lake right now.

Ms. McPhedran: If ever there was something appropriate for a royal commission, it must be how we build our Constitution.

Mr. Chairman: Thank you very much. I suspect, as we get close to one o'clock and to the band, that one has some appreciation perhaps of what first ministers were feeling like at four or five in the morning. Breakfast seems like an eternity ago and our constitutions are compelling us to go off to lunch. We want to thank you very much for coming here today, for your presentation, for your responses to our questions. We appreciate the time you have taken to do that.

The committee recessed at 12:59 p.m.





CARON

XC2

-87C52-

C-21b

(Printed as C-21)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, MARCH 30, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Matrundola, Gino (Willowdale L) for Mrs. Fawcett

Clerk: Deller, Deborah

Clerk pro tem: Decker, Todd

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

Individual Presentations:

Levman, Dr. Garry M., Research Associate, Department of Physics, University of  
Toronto

Charnetski, William

Pearce, Tracey

Curtis, Donald C.

Carrigan, Edward

From the German-Canadian Congress:

Meinzer, Gerry E., President



## LEGISLATIVE ASSEMBLY OF ONTARIO

## STANDING COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, March 30, 1988

The committee resumed at 2:11 p.m. in committee room 1.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good afternoon, ladies and gentlemen. If we could begin our afternoon session. I would like to call Garry Levman, who is our first witness for the afternoon.

I want to welcome you to the committee this afternoon, Mr. Levman. We appreciate your taking the time and effort to come before us as a private citizen. Please have a seat. We often note that we get representations made by a number of groups and organizations, but I think committees are always keen to get views from various individuals. In fact this afternoon we have a number of private citizens who are going to be appearing before us. So I would once again say welcome. We have a copy of your submission, so if you would like to make your presentation, we will follow up with questions.

GARRY LEVMAN

Dr. Levman: My remarks will basically follow the copy you have in front of you, but I have shortened it slightly.

Let me begin, first, by saying that I oppose the constitutional settlement as it is now proposed because it gives insufficient protection to minorities and individuals. It grants the provinces too much power to hinder or prevent future constitutional reform which is badly needed.

Every nation has its poor, its ill, its handicapped; its religious, ethnic and linguistic minorities; its dissidents, political and social. Government is required not only to provide services needed by all, but also to protect individuals and groups vulnerable to social or economic pressures.

Sectarian violence is found today in many nations of the world. There is an enormous catalogue of unhappy places of woe, places like Northern Ireland, the Basque provinces of Spain, Cyprus, Lebanon, Palestine, India, Sri Lanka, South Africa, Armenia and Tibet, among others. Not all of these countries are or were dictatorships.

Some even were or are considered to be free and equitable societies. Why do serious problems arise even in democracies? Is Canada immune? No one doubts that Canada today is among the freest countries. But wounds from unfairness and injustice, allowed to fester, can lead to civil discontent and unrest. Goodwill alone is not enough. A country's leadership must move forcefully to address grievances and to redress wrongs. Only then do people believe that government is truly caring, responsive and responsible.

A chief cause, if not the chief cause, of the turmoil seen world-wide is the refusal of majority government to respect vulnerable minorities. Of course in a democracy, majority rule should decide questions of general policy;

Dr. Levman

C-1410-2

2

March 30, 1988

however, it must always adhere scrupulously to natural and democratic rights, such as those embodied in Canada's Charter of Rights and Freedoms. But an additional and important stipulation is often overlooked. No law should grant an individual or groups rights or privileges not granted to all. Such a law discriminates automatically against those denied and divides the citizenry into invidious classes.

Does any group need special protection or privileges in a democratic society? Certainly not pluralities or majorities. They have the weight of numbers and the incumbent political and economic power that comes with representative government. If a nation is to single out individuals or groups for special favour, then it has a moral responsibility to--

C-1415 follows

↓



~~pluralities or majorities. They have the weight of numbers and the sound~~  
~~political and economic power that comes with representative government. If a~~  
~~nation is to single out individuals or groups for special favour, then it has~~  
~~a moral responsibility to choose those that are suffering. Naturally, as~~  
conditions ameliorate, special privileges are surrendered, willingly one  
hopes. History is no excuse for continuing them.

Unfortunately, majorities often attempt to ensure for themselves  
privileges or even simple conveniences through implicit if not explicit  
discrimination. Bad laws of this kind are often justified by being called  
"reasonable," despite the fact they are unfair. Usually it is just as  
reasonable not to have unfair laws, but this is often overlooked under  
political pressure.

A simple example from Ontario demonstrates this. Boxing Day is not a  
holy day to any Canadian. It exists solely because of Christmas. In fact, not  
even all Christians celebrate Christmas on December 25. The Orthodox, for  
instance, follow the Julian rather than the Gregorian calendar. Yet in  
Ontario, not only is December 25 set aside as a holiday, but also Boxing Day.

Now it is certainly reasonable that Boxing Day be a holiday, or Good  
Friday, or even Easter Monday for that matter. But it is also reasonable that  
it not be a holiday. Many small wrongs can sum to a considerable burden.  
Individual and minority rights should be strictly respected by all laws and  
all levels of government unless an unreasonable situation arises otherwise.  
This basic principle of social justice must be firmly embedded in any  
constitution.

The situation in Ontario and Canada. Fear and jealousy exist in all  
societies, and human nature is such that they are difficult to eliminate. So  
long as mankind is imperfect, individuals and minorities will suffer from  
prejudice and discrimination. Everybody should be assured, however, that  
government, at least, is free from bias and prejudice. In this regard, it is  
important to realize that a government which prefers some individuals or  
groups over others discriminates. Only those suffering from social or economic  
disadvantages should ever be singled out for special protection, aid or  
privilege. Moral government protects the weak from the strong.

In Canada, both the English and French cultures are very healthy. Even  
without any support from the Canadian government, our European heritage  
multiculturalism would be in no danger and would suffer no great disadvantage.  
On the other hand, other cultural groups are not so fortunate. In particular,  
aboriginal Canadian culture is in an extremely precarious position. Its sole  
base is here in Canada, and even with the vigorous support of the native  
peoples themselves, its continued survival is in doubt. As a nation, we have a  
moral responsibility toward Canadian Indians and Inuit, whom no other nation  
can be expected to nurture. Does Ontario and Canada live up to its obligations  
to cultural minorities?

In any society, people must communicate with one another. The need for  
official languages for use in government, in courts, in the military, in  
public institutions and places is a hard reality. Despite the inconvenience  
and even hardship it might cause to some, it is clearly impossible to treat  
all languages equivalently. Nevertheless, when a large percentage of the  
population speaks a language, it should be an official language of government.

Dr. Levman

C-1415-2

4

March 30, 1988

This does not imply that everyone must speak that language. It only means that government and publicly funded institutions and organizations are obliged to provide services in that language.

Whenever an official language exists within a political jurisdiction, all governments within that jurisdiction should honour it. Doing otherwise creates inequality. Unfortunately, in Quebec, the provincial government humiliates speakers of English, so I hear from the language commissioner, and in the rest of Canada, this is reversed. This situation breeds discontent. That private citizens display bigotry based on language is bad enough. Much worse is government itself doing so.

The constitutional development of Canada began an intolerant age. But even in the 18th century, the evil of religious intolerance was recognized. In the Constitution of the United States, the establishment of a state religion was strictly prohibited. Later, in France during the revolution, an attempt was made to found government solely on secular principles. When Canada was founded, Britain had an established state church with the monarch as its head. It still does.

In order to protect Roman Catholics, who formed the majority of the French-speaking community, the constitution granted them certain privileges and rights, especially in language and education. Today, religious toleration is no longer an issue, and privileges, designed to prevent abuse, have turned into preferential treatment which discriminates against other religious minorities who are as worthy or even more worthy--

C-1420 follows



March 30, 1988

(Dr. Lewman)

~~Today, religious toleration is no longer an issue and privileges designed to prevent abuse have turned into preferential treatment which discriminates against other religious minorities who are as worthy or even more worthy of protection.~~ Continuing discriminatory privilege granted to a majority or plurality solely on historical grounds, comes dangerously close to the establishment of religion. Ontario has offended by its refusal to grant all religious minorities the same rights and privilege in education that it grants to Catholics. Recently it has even extended support for Catholic education while at the same time denying support to Moslems, Hindus, Jews, Christian evangelicals and others. The government justifies this action because of historical injustices to the Catholic community. However, it overlooks that Catholics now form a plurality in the province and so no longer need protection. And, it ignores the worst injustices to other religious minorities who are completely excluded from consideration in the past.

1420

One cannot right wrongs to the dead by discriminating against the living, especially when the living are descendants of those most wronged. The granting or extension of privileges to one religious group to the exclusion of others who are in need of the same or more protection, is the worst kind of unfairness. Privilege must be granted to all or else completely withdrawn unless it is patently clear that they are needed to protect people from abuse. Of course, citizens must accept historical realities. Age old privilege, ??rights often cannot be withdrawn without causing severe social and political dislocations, but government must work to decrease disparities and to lessen the effect of special privilege where it causes inequality.

A similar insensitivity has been found in the establishment of provincial holidays and also in the rules governing business on Sundays. Good Friday, Christmas, Boxing Day, are all religious holidays honoured by only a segment of the population. Sunday is a common day of rest in Canada, but it too is special only to the part of the populace. Nevertheless, these days are enmeshed in discriminatory government regulations. No one should be forced to work. No one should be forced not to work. Too many people, Orthodox Christians, Seventh Day Adventists, Buddhists, Moslems, Hindus, Jews, atheists or others, who simply want to work or shop, are injured by laws designed blatantly for the convenience of a particular religious group, whether it be large or small.

The recent plan in Ontario to allow municipalities to decide rules for Sunday shopping abrogates provincial responsibilities and allows local governments to continue or extend existing discrimination. In view of such problems, individuals and minorities need stronger protection in the Constitution. Because of existing political pressures, one cannot expect that Parliament or legislative assemblies will also rectify wrongs and injustices, especially where the action required, though correct, fair and moral, is inconvenient or unpopular.

The Constitution of Canada: In the constitutional settlement, as it now stands, a remarkable condition exists which is symptomatic of all its deficiencies. The most protected institution in Canada is its least democratic, the Monarchy. All the provinces must agree to any changes in the status of the Monarch, the Governor General, the Lieutenant Governors. Yet, by invoking the infamous notwithstanding clause of the charter, Parliament could rescind any of the natural or democratic rights that individual Canadians




possess. Only language rights are inviolate.

This situation is the exact opposite of what is required in a fair, equitable democracy. Natural democratic rights should be the most difficult to remove. Changes made to make a country fairer, more equitable, more democratic should be easy to accomplish. So long as a province follows the democratic guidelines laid out in the charter, it should be free to reorganize its internal government without interference from other provinces. In this matter the great disparity of population between the various provinces, must be kept in mind. It is unfair that any one province possess a veto power over reforms that promote democratic and egalitarian aims. It is completely just that the people of the territories decide for themselves when to establish provincial government. But veto powers granted to the provinces are too extensive and will greatly interfere with future constitutional reforms needed to improve our democracy and to eliminate the irritating inequalities which still exist in Canada.

The Canadian Charter of Rights and Freedoms is the most important pillar of the Constitution and the strongest buttress of our individual liberties. It proclaims the fundamental, natural and democratic principles which limit the powers of government and so is the chief statutory protector of the citizens of Canada from governmental abuse. Any constitutional reform must be subject to it and it must be very clearly stated that it is subject to it. Although far reaching, it has its weaknesses. There is no clear statement in the charter prohibiting government from granting privileges, favours or preferences to--

C-1425-1 follows



March 30, 1988

Dr. Levan

~~subject to it and it must be very clearly stated that it is subject to it.~~  
~~Although for reasons that have its weaknesses, there is no clear statement in~~  
~~the charter of the government from granting privileges, favours or~~  
~~preferences to individuals or groups which could not be reasonably granted to~~  
all or reasonably withdrawn. The acceptance of this prohibition by Canadians  
and its enshrinement in the Constitution will enclose an important back door  
to discrimination and injustice. By allowing Parliament to supercede the  
provisions of the charter, clause 33 of the charter, the notwithstanding  
clause, casts disrepute on parliament's commitment to the principles  
enunciated therein. In times of peace and economic well being, there is no  
need for such a clause. One expects and hopes that it will only be in times of  
crisis that clause will be used. However, exactly then is the charter most  
needed to protect individuals and minorities.

The new existence of an escape clause is an invitation to use it. Why  
does Canada need protection from strict adherence to the charter? Clause 1  
allows reasonable limits to rights and freedoms. This limitation is itself too  
strong. What is reasonable to one may be unreasonable to another. Laws and  
regulations should adhere strictly to the charter unless it would be  
unreasonable to do otherwise. Both clause 1 and clause 33 should be excised  
from the charter. Our limitation in applicability to the charter is not  
required. If one is insisted upon, then it should be phrased so that  
government must adhere strictly and scrupulously to the charter of rights and  
freedoms whenever it is reasonable to do so.

The Meech Lake accord should not be ratified by Ontario unless:

1. The veto power of the provinces is reduced and mechanisms are  
provided to facilitate democratic change to the structure of Canada and the  
provinces.
2. A clear statement is added to the Constitution prohibiting privileges  
or preferences possessed by some, but not all citizens, if it is reasonable  
that either all or none possess them.
3. The notwithstanding clause, clause 33, of the Charter of Rights and  
Freedoms is rescinded.
4. The reasonable limits clause, clause 1, is modified so that  
government is limited by the charter whenever strict adherence to the charter  
is reasonable.

Mr. Chairman: Thank you very much for your comments. I think I would  
be fair in saying not only on the Meech Lake accord, but you raise a number of  
questions with respect to the charter itself apart from the accord and one of  
the interesting threads through some of the testimony we have had is the fact  
that in a sense we do not know yet how the charter will be interpreted in all  
its provisions, because it is a relatively new entity and that we may very  
well say after another three or four years want to be looking very  
substantively at the charter in terms of have all the various rights that have  
been set out there, have they done the things that we had initially intended  
them to do. I find your presentation interesting from those two aspects, one  
your concerns about the accord. Equally, issues that you raise around the  
charter, even without the Meech Lake accord, with respect to section 33 and  
section 1.

8


March 30, 1988

Dr. Lewman: With the changes to the charter that I had asked for, which I suggest, and with the provision that the charter is paramount in Canadian constitution, I have ultimate faith that individuals and all minorities will be well protected. However, if the charter is allowed to be weak, then that is not true. As long as all the provinces, Quebec, Ontario, bind themselves to obey, follow the charter scrupulously and honestly and fairly, then I see no reason for to worry, because then all citizens could be guaranteed that they will be treated properly and correctly.

However, as I tried to point out, I think there are many problems still even with the charter as it now exists. There are still many problems here in Canada and in Ontario in particular, because I live here in Ontario, so that is why I worry mainly about Ontario.

I think the charter needs strengthening and I think that if it is strengthened, then there is no reason for any worry, but as it stands now, I believe there are serious problems. One always can look to the courts and hope that the courts will uphold the provisions of the charter, but I believe that much better is for parliament and the legislative assemblies to commit themselves first, and then you do not have to a court of last appeal.

C-1430-1 follows





(Dr. Levman)

~~and hope that the courts will uphold the provisions of the Charter of Rights and Freedoms. But I believe that much better is for parliament and the legislative assembly to commit themselves first and then you do not have to have the court of last appeal. Courts of last appeal should be used only rarely and that is one of the reasons why we have a charter; so that every citizen, including all members of Parliament and all members of the Legislative Assembly can clearly understand what the rights of individuals and minorities are, what the obligations of the citizenry is so that they will draft laws that do not need to be appealed. A great deal of political effort goes into appealing these laws and a great deal of emotion is involved around them, and it is better to have good laws first and then--for citizens to understand why the laws are like that because they have to be like that in order to be fair then it is to after the matter to run to courts.~~

1430

Mr. Chairman: So, that we are not just making laws to provide lawyers with work?


Dr. Levman: Yes. I am dissatisfied with the way the Constitution is written because it is so difficult for any citizen to read it. It is not a very simple document with all the rights and obligations of the citizenry well set out.

Mr. Breaugh: Yes. This is a kind of an interesting approach to it all. One of the things that I think is true is that if one looks at the current Constitution and particularly the clauses that you have pointed out, the notwithstanding clauses, etc., one does get the indication that that is a kind of unreasonable way to proceed. That you either have a right under the Charter of Rights or you do not, and as long as it is reasonable, the courts will make the judgment call as to whether a provincial law is a reasonable way to proceed and reasonably protects the individuals in that province against the violation of their right. I think the truth is that when we drafted the Constitution the first time around, there was considerable apprehension and considerable knowledge among the politicians who did the drafting that this could get untenable in a hurry, that the basis of our parliamentary system is that there is a group of--upstairs here--130 reasonable people who will not pass laws that are unreasonable and that the charter should be there and people should have that protection, but the notwithstanding clause was basically kind of an insurance that until we are clear how the courts will react to this and until we have had some experience with challenges under the charter that the provincial governments needed some measure of protection almost, that they would not be--because it literally is true now, that you really could undermine the whole governmental process of a nation by means of challenges. I would be interested in your comments on that balancing that has been done. You obviously are not happy with the notwithstanding clauses, but I would put to you that they have not been used extensively.

Dr. Levman: No, I agree. I think that is a hopeful point, that they have not been used. But my point is that if there is a restriction limitation on the Charter of Rights, it should be phrased negatively, in that the Charter of Rights should be followed scrupulously unless it is unreasonable to do otherwise.

It is always possible to convince oneself that one is doing something reasonable even if one is doing something that is unfair, unjust or even discriminatory. It is much more difficult to convince oneself that if one did not do it, that would be unreasonable. In other words--Good Friday is a provincial holiday, right? That is very reasonable because the majority of the population take Good Friday as a holy day although there is a large and substantial portion of the population that consider it just like any other day. So, that is reasonable. On the other hand, it could also be just as reasonable that it not be a holiday. It is not a holiday in the United States even though a large percentage of the US citizens also consider it to be a holy day. For instance, East Monday, people may say, "Well, we are taking Good Friday off, perhaps even Easter Monday should be a provincial holiday. That way people will get a full four days off." In Germany, this is a common practice to have very long weekends. It would certainly be reasonable that Easter Monday be a holiday, but it is also reasonable that it not be a holiday. The only reason for making Easter Monday a holiday would be because Good Friday...

C-1435 follows



(Dr. Levman)

... this is a common practice to have long weekends. They would argue that it is reasonable that Easter Monday be a holiday, but it is also reasonable that it not be a holiday. The only reason for making Easter Monday a holiday would be because Good Friday exists, and Good Friday exists only because it is convenient for the majority of the population.

If you establish a structure that a law must be reasonable, but if a law is reasonable or a limitation of the charter is reasonable and it can be upheld, then you are allowing for injustice. This is the back door to discrimination. What one must insist upon is that there be no discriminatory laws unless it is unreasonable to do otherwise.

We do not allow 16-year-olds to vote. To allow children to vote would be unreasonable. You cannot allow a two-year-old or a three-year-old the opportunity to vote so you have to set some limits. It is unreasonable to allow all children to vote so it is clear that you have to set some limit to it and so you restrict people's rights. It is a trivial point--right?--but it illustrates the difference between doing something when it is unreasonable not to have a law or a regulation or when it is reasonable to have it. Have I made myself clear?

Mr. Breaugh: One of the things where I might disagree a bit with you is, in my neighbourhood a lot of people in the neighbourhood are Seventh Day Adventists so their holy day is Saturday, but it does not bother any of the rest of us that they all go off to church and we go to Steinberg's. It is no big deal. It would be equally unreasonable for me to argue that Good Friday is seen by most of my neighbours as a holy day. Most of them do not go to church, so holiness has got nothing to do with it. Holiday, maybe, holy day, nothing to do.

Dr. Levman: Yes.

Mr. Breaugh: Our traditions are kind of changing. For most people, I think their assessment is holy day or holiday, so what? We are used to having Good Friday off so we got it off. That is it. There is no big deal about religious discrimination here. No one sees it in that light. No one talks to me about that kind of stuff. They have accustomed themselves to that, much in the way that what you have referred to as a kind of veto power of the provinces would be unreal.

Every other province of Canada came into being not because they decided they wanted to form a province but because some other elected group of folks decided it was time you became a province. Even the people from the Northwest Territories and the Yukon, you could make them really unhappy today by saying, "We want you to be provinces tomorrow." You have that right, not only that, you have got that obligation. Of course, they would be saying: "Wait a minute. Wait a minute. We have got some programs under way here that have to go on for a while and we are a little short of people. We are not quite ready for that yet. We will tell you when we are ready and we want some participation in the process."

What they are nervous and apprehensive about in private conversation and when they were here is not necessarily that they are afraid of all the province saying: "Nuts to you. You are not ever going to be a province." What



they are concerned about is the practical application. They have lost their place at the bargaining table and if they can get that back they might be able to handle this. They have different perspectives on it and they do not quite see it in the way that you do.

Dr. Levman: My point of view for the territories, at least, is they should decide for themselves when to establish provincial governments, of course, along with the federal governments and that the provinces should have no say in whether the territories become a province or not. The citizens in the Northwest Territories and the Yukon must decide for themselves about the internal structure of the territories.

Mr. Breough: Most of them, in private and public conversations, have argued that they want to do it the way everybody else did. If they did not decide for themselves, they negotiate it with the federal government. That is kind of between you and I.


Dr. Levman: They should negotiate with the federal government, of course. They are territories. Whether the provincial assemblies of Ontario should have a say in what goes on inside, whether Yukon becomes a province or not, I think is irrelevant. I think it is not right.

Mr. Breough: OK. Thank you.

Mr. Chairman: I would like to thank you very much, Mr. Levman, for your presentation. As I mentioned earlier, I think you have focused or come at it from a slightly different perspective, which is one of the nice things about hearing from many different people as we go through this.

Your focus on rights, which in a sense has been I suppose the issue of the day, has raised a number of questions that really have not be brought up in quite that fashion, as well as some concerns that you have about the strength of the charter and where...

C-1440-1 follows.



(Mr. Chairman)

~~I suppose, has been the issue of the day, and has raised a number of questions that really have not been brought up in quite that fashion, as well as some concerns that you have about the strength of the charter and where we want to go, or where we ought to go with that over and above Meech Lake.~~

1440

We thank you very much for the time you took for joining us this afternoon.

If I could then call upon our next witnesses, Bill Charnetski and Tracey-Anne Pearce. We have a couple of submissions.

Ms. Pearch: Of light reading.

Mr. Chairman: Some light reading. Good, now is all clear. We have a copy of your written submission as well as the oral presentation you are going to make. We are pleased to accept both. Let me say welcome, and please proceed with your presentation and we will follow up with questions when you have finished.

WILLIAM CHARNETSKI

Mr. Charnetski: Thank you, ladies and gentlemen. My name is Bill Charnetski. Both my copresenter, Ms. Tracey-Anne Pearce and I are students at the constitution litigation seminar at the University of Toronto law school. We are appearing before you here as private citizens.

On behalf of Ms. Pearce and myself, I would like to thank you for giving us the opportunity to appear before you here today. We hope that as students we may be able to offer a unique perspective on the issues before this committee as we approach these questions without cynicism and preconceptions.

I believe you have received copies of both our written presentation and a copy of the oral presentation that we will be making. We will now address a couple of the most important issues discussed in our written paper.

In the full written submission, we undertook a legal analysis of the affect of the distinct society clause, and of section 16 of the accord on women's equality rights. In addition, we offered a legal critique of the joing committee report prepared last fall.

We feel that everything we addressed in that written paper is important, and should be considered by the committee. Due to the time constraints we face today, however, we will limit our oral submissions to three points which we believe we covered in a detailed and unique fashion.

First, I will outline the legal critique of what we see as an unacceptable joint committee report on the Meech Lake accord. Second, I will submit that the effect of the recent Supreme Court of Canada decision in the separate school reference may be to infringe women's equality rights guaranteed by the charter. Third, Ms. Pearce will be discussing the negative impact of section 2 and section 16 on future attempts to define equality.

First, the joint committee report. In our minds the report of the joint committee and, in fact, the whole hearing process is unacceptable. At the federal level, the nature of the hearing process has hampered public understanding in input in many ways. The timing of the hearings in midsummer, the short time given to groups to prepare their briefs, the seeming fait accompli those groups confronted, and the unworthy suggestions that those who criticized the accord were really anti-Quebec, were factors that led to the complete frustration of many people with the public process.

The actions of some of the committee members indicated that they had no intention of listening to the offered testimony with open minds. Their attitudes indicated that in their minds the standard of proof faced by those who opposed the accord was even higher than the requirement of egregious error set by the first ministers.

The report was even more disconcerting than the hearings. In it, the committee seemed to obliterate the line between political and legal analysis. In addition, the committee seemed to ignore completely the fact that there are no black and white answers to legal questions.

The committee heard relatively little true legal opinion, that is legal opinion from lawyers and, furthermore, the report cites with approval only that opinion that supports its conclusions and dismisses those experts, like Eugene Forsey, John Whyte and Mary Eberts, who disagree with those conclusions without reasons.

Our view is to the appropriateness of the political ramifications of the accord are irrelevant to our presentation. Our concern is the effect in law the enactment of these provisions will have on women's equality rights.

I would like to note as well that the public need for understanding has also been ill served by the unity of leadership of government of both national opposition parties behind the accord.

~~One of our highest concerns~~

(Tape C-1445 follows)



(Mr. Charnetski)

~~leadership of government of both national opposition parties behind the accord~~

One of our biggest concerns with regard to the distinct society clause arises out of the recent decision in the separate school reference. Our fundamental concern is that the decision, particularly the judgement of Madame Justice Wilson, creates a higher key of constitutional documents so that some portions of the Constitution are clearly superior to others. We are worried that in light of that development, legislation enacted pursuant to that provision may be immune from charter challenge.

Even if the distinct society clause is not held to be a power-granting clause, it will have more importance attached to it than other interpretive clauses influencing the section 1, "there is no limitations analysis," because the clause will become part of the Constitution Act, 1867.

At this point, I would like to note that neither the drafters of the accord, nor any of the first ministers, have offered any rationale for the inclusion of the distinct society clause in the earlier constitutional document.

In the minds of many, the superficial attempt by the drafters to rewrite history is symptomatic of an underlying failure by those involved to consider fully the ramifications of their decisions. The drafters negligence in not considering the affects of their actions on parties who are unrepresented at the negotiations, such as women's groups, is as offensive as the actual end result of those negotiations.

I do not have time to analyse in detail the arguments arising out of the separate school reference, so I will touch only on a couple of points which I believe are crucial.

First, please keep in mind that the language used by Madame Justice Wilson can encompass the immunization of any power-granting provision within the Constitution, and therein lies its uncertainty. I would be very interested to discuss with you the efforts of the federal government lawyers in the case of Penikett, the Yukon challenge to the accord. In that case, the lawyers argued that after the separate school reference constitutional amendments cannot be subject to the charter. The lawyers continued to pursue this argument in the Yukon Court of Appeal.

Second, the committee felt that it had heard enough testimony to justify its conclusion, which I submit is incorrect, that as a matter of law the clauses neither grant new powers nor derogate from existing powers. It is their believe that the distinct society clause is clearly an interpretive clause. However, not only did the committee ignore the testimony of many other legal experts, such as Beverly Baines, Mary Lou McPhedran, Mary Eberts, and other people that I have mentioned earlier, but it also ignored the statements by Quebec leaders such as Premier Bourassa, which indicate that they would be very surprised to learn that they had obtained no new powers under the accord.

Third, I would like to highlight our example involving abortion, showing how the distinct society clause could be used to infringe women's rights. A declining birthrate, or the belief by a government that the majority of

Mr. Charnetski

C-1445-2

16

March 30, 1988

citizens viewed abortion as wrong could prompt legislation restricting women's access to abortions on the basis of preserving or promoting a distinct society.

This is not some kind of fairytale offered by women's groups merely to scare committee members. Since the Morgentaler decision, British Columbia Premier Vander Zalm has blatantly disregarded the law and Charter of Rights and Freedoms in his attempts to prohibit abortions. If he were to attempt in the future to justify his tactics using the distinct society clause, or if a future Quebec premier were to use similar methods to arrest a declining birthrate, the women's fears would be realized.

Pearce  
Ms. Pearce: The third issue we would like to address is the negative impact of section 2 and section 16 on the definition of equality.

The aspect of the accord, which has the potential for the most far reaching and devastating effects to equality was one which received virtually no recognition in the joint committee's report. The aspect of which we are speaking is the influence, the failure to safeguard equality rights in the accord will have a judicial definition of equality.

The charter is a relatively young document, and while the concept of equality has received some judicial attention, it has by no means been conclusively defined. Undoubtedly, cases involving equality will arise after the accord is incorporated into the Constitution. But it is our submission that as the courts consider the Canadian concept of equality they will examine the Constitution itself for clues as to its meaning. The lack of regard given to equality rights in section 2 and section 16 of the accord--

(Tape C-1450 follows)



~~but as the courts consider the Canadian concept of equality, they will examine the Constitution itself for clues as to its meaning. The lack of a guard given to equality rights in section 2 and section 16 of the accord will impact on the scope and weight accorded the notion of equality, and this impact will extend beyond those cases simply considering sections of the accord.~~

1450

The Meech Lake accord makes a symbolic statement which has negative implications with respect to the importance of gender equality as of value in Canadian society. Professor Lynn Smith, in a paper presented at the University of Toronto conference on Meech Lake, states:

"Symbolism can be important in the context of constitutional formation, as the example of the Meech Lake accord itself illustrates. While Quebec was legally subject to the provisions of the Constitution Act 1982, including the charter, from April 17, 1985 onward, the symbolic importance of its exclusion from the final stages of formation of that constitutional amendment lead to a strong and quite understandable push to bring Quebec into the constitutional family at the symbolic level."

The symbolic statement made by the failure to mention women's equality rights in the Meech Lake accord, while mentioning other similar rights, and in the context in which women's rights, along with equality rights for minorities, could be seen as relegated to secondary status is that the goal of achieving equality for those groups is secondary to other goals.

The task of defining "equality" is a rigorous one. The meaning is not self-evident nor is it defined in the charter. The opportunity to develop a uniquely Canadian conception of equality is a tremendous chance to further the cause of social equity.

We recognize that many considerations will factor into the judicial formulation of what constitutes equality. Of primary importance are the messages, both explicit and implicit, that the legislatures send to the courts. It is our submission that the accord is one such message. By denying protection to equality rights from the operation of section 2, the accord says that equality is not highly valued and that other considerations may take precedence over equality considerations.

Certainly, the possibility that the accord may affect future attempts to define "equality" is evidence that the impact of the "distinct society" clause will be felt beyond the borders of Quebec and that its significance is not confined to section 1, charter analysis.

We appear before you today not simply as two students of constitutional law interested in the legal impact of the Meech Lake accord. We also stand here as young Canadians concerned about the process of Meech Lake, a process which we suggest to you has disillusioned and disenfranchised much of the Canadian public. There is a feeling of futility among those attempting to offer constructive criticism.

This committee has been given an opportunity similar to that of the federal joint committee. It is our earnest hope that those of you here today will achieve what they could not, that you will look beyond your party



Ms. Pearce

C-1450-2

18

March 30, 1988

obligations and realize the profound responsibility all of us have in ensuring a lasting and equitable Constitution.

I would like to quote a classmate of ours. ??Lawrence Grafstein wrote in a recent edition of the University of Toronto ??Faculty of Law Review:

"Future generations will look back at the joint committee's report in anger. They will be angered by the report's inability to support even its most elementary positions without lapsing into inconsistency, angered by its obscurity, by its denial of plain reality, by the way it verges on outright duplicity.

"Further, historians will not be impressed by the intellectual rigour of Canada's leading constitutional experts. For a nation so recently achieved of full independence, a nation so obsessed by its Constitution, a nation where individual rights are so fragile, it is the careless attitude of the political and legal elites that prompts the greatest anger of all."

Our final recommendation to this committee is that sections 15 and 28 should be included in clause 16 of the accord. This would ensure that women's rights, those most threatened by the "distinct society" clause, are sufficiently protected.

Alternatively, if no changes are to be made at this time, we believe that it is imperative that the Ontario government refer the accord, or at least the "distinct society" and "linguistic duality" provision, to the Ontario Court of Appeal. At the very least, both sides in the debate will then understand more clearly the ramifications of these provisions.

Mr. Chairman: Thank you very much for your oral submission. We certainly will have an opportunity ...

C-1455 follows

↓

~~the provision to the Ontario Court of Appeal. At the very least, both sides in the debate will then understand more clearly the ramifications of these provisions.~~

Mr. Chairman: Thank you very much for your oral submission. Certainly we will have an opportunity to go through the written brief, which clearly adds a great deal more to the arguments that you set forward. I also want to thank you for taking the time to put all of this together. It is interesting to me that today there has been a certain focus on the charter in particular and the question of charter rights. That was not done by any reasoned process because we did not know exactly what people would be talking about, but it is very useful, I think, as we go through it, really looking at specific charter questions today.

We will start questioning with Mr. Eves.

Mr. Eves: Thank you. I missed the opening part of your presentation but I have thumbed through your brief. I think it is a very well prepared document indeed. Of course, the fact that I happen to agree with your conclusion might have something to do with my objective thinking on the matter.

On page 29, I gather your recommendation is, as you say, that sections 15 and 28 should be included in clause 16 of the accord. People such as Professor Baines, to whom you have referred in your comments, and others have indicated that perhaps all rights granted under the Charter of Rights and Freedoms should be protected in section 16. Would you concur?

Mr. Charnetski: In our minds, as our recommendation sets out, we only want sections 15 and 28 included, because we feel that those are the two rights--it is women's equality rights that are being threatened by the accord as it now reads. I think we would stay with that submission. There is a certain amount of strength in focusing on one's equality rights and we believe that to open up the entire charter as being unprotected is perhaps inconsistent with the notion the permeated the Constitution that those charter rights are not unlimited. We do have a section 1 limitation and there is the section 33 "notwithstanding" clause. Somehow to say that the charter is entirely immune from the Meech Lake provisions I think would be inconsistent.

Mr. Eves: You disagree with Professor Baines on that one particular point.

Mr. Charnetski: Yes.

Mr. Eves: She does agree with your bottom line suggestion that if the committee is unwilling or unable to suggest amendments, or come to any agreement about it, the very least they should do is refer those specific provisions to the Ontario Court of Appeal, and obviously you agree with that.

Mr. Charnetski: Yes, I do. I understand from reading some of the previous testimony before you that that has been recommended by a number of the people who have appeared before you. While that certainly is not the ideal suggestion in our minds, we think it is important that there be some examination of the actual effect of the "distinct society" clause because, to us, it is the uncertainty of the clause, while perhaps necessary in drafting any legislative document, that still must be examined when it is as important as this "distinct society" clause will be.

Mr. Allen: I think that this is the first brief we have had from a group of law students, is it not? I am glad to have you come along near the end of our proceedings, when we have the opportunity of weighing your recommendations over against that of so many others.

I wonder if I could ask you about a couple of items. You talk about the disillusionment and disenchantment with respect to the process. I think I know what you are saying. I have a sense that the appearance of the charter, with its democratic equalitarian emphasis led many people to expect that the constitutional process of reform would follow that same kind of route, in spirit at least, and I would certainly be the first to observe that it did not do that. Are you also saying that the present process is . . .

1500-1 follows





(Mr. Allen)

~~... led many people to expect that the constitutional process of reform would follow that same kind of route, in spirit at least, and I would certainly be the first to observe that it did not do that. Are you also saying that the present process is less democratic than what we have been used to?~~

1500

Ms. Pearce: What are you referring to when you say "we have been used to"?

Mr. Allen: My understanding of the process in the past is that in order to get a constitutional amendment we have had to, in effect, first of all call a meeting of the premiers in order to see if there could be some unanimity because we knew when we went to Westminster, we would be asked whether everybody was in agreement, and if everybody was not in agreement, we would be sent back home. There was never at any point in all of that any public participation, no process or what have you, whereas now we at least appear to be in a situation where--we do not have to have unanimity on most things, we can have 50 per cent of the population and seven provinces, and there is much more room, at least, for the process to open up to select committees and so on, depending on how you do it.

The way it has happened has been somewhat unfortunate, but is not a method that is inherent in the Constitution. One could almost suggest, as I did in the beginning, it was against the spirit of the charter, but certainly it is not a method that is necessary in terms of the actual words and clauses of the Constitutional document as we have it, or what is proposed in Meech Lake even.

Ms. Pearce: I think it is certainly true that this is an improvement over trotting over to England, and I would also agree with you that the function--as the public hearing process does not necessarily have to work in the negative manner that I feel it has worked as far as Meech Lake is concerned. I think it is important that something not only be fair but appear to be fair, and I do not think we have achieved either of those things in the Meech Lake hearings.

To say that it is better than what we had and that the structure is not inherently faulty, I do not think addresses the fact that it did not work this time. I think it is important to publicly say, "It did not work this time," if only to avoid the errors that we did make this time.

Mr. Allen: Yes. I quite agree with that. I just wondered whether I should hear you also saying that--

Ms. Pearce: No.

Mr. Allen: --what is written in documents at this point in time has somehow taken away an enfranchisement that we did have.

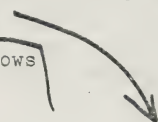
Ms. Pearce: No.

Mr. Allen: Which is not the case. OK. Thank you very much on that point.

An argument that has appeared, I think, more recently in some of the presentations has to do with the connection between what is happening around the abortion issue in Canada and Meech Lake. I am very puzzled by the argument. If I can just explain my puzzlement, as I understand what has happened is that the Supreme Court, looking at the charter and rights under the charter for equality of access to health services etc. across the country, that the present federal law respecting abortion, the terms of its availability and so on, does not provide equal access for women across the country and therefore the law is no longer considered of effect in that sense.

In the wake of that and in the light of the fact the federal government has not had, in its hip pocket, a substitute piece of legislation to bounce out for everybody to organize their lives around again--we are in a very interim, somewhat chaotic, situation where it is easy for the Vander Zalm's of this world to go off half-cocked and let their own private dispositions appear to rule the legislation and the patterns of delivery of that service in a province. Of course, we have seen that already the courts have begun to take hold to start ??bringing that sort of reaction back, but it is very much interim.

C1505 follows



~~the patterns of delivery of the service in a province. Of course, no one has~~  
~~seen that already courts have begun to take hold to start bringing that sort~~  
~~of reaction back, but it is very much the same.~~ To take that as an example of  
what will happen under Meech Lake if we do not somehow reinforce the equality  
rights provision of the charter, I am having a hard time getting them from  
here to there. Do you see what I mean?

Ms. Pearce: Sure.

Mr. Allen: Maybe you can explain it to me because I have not asked  
this question of anybody yet. I have just been waiting for the opportunity and  
you are the first one I have dumped it on.

Ms. Pearce: I think there is sort of two ideas operating here, the  
idea that somehow there is a possibility that laws relating to abortion could  
be enacted under a "distinct society" provision and that these laws would  
impact on women's equality rights. That is the first idea. The second idea is  
why are we talking about Premier Vander Zalm in British Columbia when  
"distinct society" clause has to do with Quebec.

To address the first, we present a sort of hypothetical abortion example  
just simply as an a suggestion that this may be an area where women's equality  
rights and this "distinct society" clause could come into conflict, that there  
is a possibility that the Quebec government may use the "distinct society"  
clause to justify some sort of abortion legislation, not necessarily what we  
used to have but something and that may ruled to be against the equality  
provision safeguarding women's rights.

Would you like me to address the second issue of why we are talking  
about British Columbia when it is a "distinct society" clause?

Mr. Allen: If you feel you have something more to add to your  
answer, why certainly.

Ms. Pearce: I think that a lot of the dismissal of the importance of  
the "distinct society" clause is to suggest something to the effect that we  
are only talking about Quebec here and if the Quebec women's groups do not  
have a problem with it, then why do we have a problem with it. We have several  
responses to that. It is around page 25 in our written submission, if I am  
correct.

I think Eugene Forsey put it well in his comment on the joint committee  
report. He quotes some women's groups from Quebec and he says sort of  
encouraging but hardly conclusive. That is our first point.

The second point: why I raise it in addition to this abortion issue is  
that we believe that there are two ways that the "distinct society" clause may  
have an impact beyond Quebec. The first is what we already touched upon in our  
oral submission, that is in the overall definition of the equality, which done  
at the Supreme Court level necessarily impacts across the country and  
secondly, and this has been talked about in several legal professors' papers,  
the idea that distinct society necessarily is a relative term, in other words,  
you define a society as distinct from something so there is the opportunity  
that other communities in Canada and perhaps provincially could state that  
they are distinct and that as such they have some right to pass laws under




some kind of twist on the "distinct society" clause. That is why we bring up the example of Premier Vander Zalm.

Mr. Charnetski: If I may just add one thing to that answer, the major way that the abortion idea ties into Quebec's actions in the future is that there now has been highlighted a major problem with the declining birth rate in Quebec. As that problem gets worse in the coming years, it is not inconceivable that a future Quebec premier will decide that abortion is somehow to be prohibited, purely because of the declining birth rate and this is the danger that we see.

There is no guarantee that a future federal government will not change the abortion law. If the Supreme Court which decided the most important characteristic of a valid abortion were to be equal access, then once again it is not inconceivable that a federal government would change the law in the future and leave the door open for a future Quebec premier to prohibit abortion or limit it dramatically in the hopes of arresting the declining birth rate.

Mr. Allen: If I could respond to that, in the first instance, it seems to me though that to use the circumstances around this particular ...

C-1510-1 follows



~~(Mr. Chagnon)~~~~generally in the hopes of arresting the declining birth rate.~~

1510

Mr. Allen: If I can respond to that. In the first instance, it seems to me though that to use the circumstances around this particular instance as though the immediate repercussions are exactly the kind of thing that will happen if and when Meech Lake is passed as though the analogous situation is in place when in fact we are in the midst of a process that has not completed itself and where the end result is not known and to say, "Look at what has happened under the repeal or the undermining of the abortion law." That is what is going to happen vis-à-vis the equality rights. If the equality rights and the accord are left pretty much as they stand now, that is really stretching it for me.

There is a point, I think, that can be argued under the "distinct society" clause in the way in which you are using it. I would find it very difficult to imagine how another province, given the language that is there, which only says that the province of Quebec constitutes a distinct society, obviously that marks it off from something else, but it does not seem to me to give any other provincial government the right to say that because we have said that about Quebec, therefore, all of the elements that attach to that attribution to Quebec automatically or will attribute to us and, therefore, if it got through a Legislature, could sustain court examination. I think that is really reaching beyond the bounds of possibility.

The third thing I would say is that I am really troubled about--although some people have said you have to prepare for the worst case scenario, you know. Do not assume anybody has goodwill. Assume everything is going to go bad. That is the way we should perhaps approach this. I take that counsel to the heart, but I sometimes wonder about the emotional tone and the impact of some lines of argument.

Can one really imagine that in Quebec in a future that we can foresee that there will be a Premier who will risk the political, electoral opposition of such a large group of women who be affected, who would be denied rights that they have come to expect in Quebec of all provinces more than any other province where there is a charter in place, which gives women more rights than they have in other provinces, and where there are other options available to the government. The government might well go out there and have circumstances say, "Yes, we will put it an incentive plan in with it." It might encourage more families to have more children, but that does not obligate anybody to do so and it does not require them to do so.

There is no impact on rights, but to actually imagine that a provincial government, a provincial leader is going to use that as a weapon somehow to promote the distinct society I think is rather far-fetched. I mean maybe your political assessment is very different than mine, but certainly that is not one that I see as a possibility on the realistic electoral or political landscape.

Ms. Pearce: You are certainly not alone in that assessment. I think our best rebuttal to that argument is in our written submission. I will just read what we have to say. We just point out that we believe it is somewhat astonishing that the criteria for judging the impact of constitutional

Ms. Dearce

C-1510-2

26

March 30, 1988

drafting is foreseeable rights diminishment. Undoubtedly, the Fathers of the 1867 Confederation would be shocked to learn some of the constitutional challenge launched at their drafting of the British North America Act.

The groups concerned with equality rights have certainly provided a myriad of scenarios in which the "distinct society" clause could limit equality rights and the fact that the committee and proponents of the accord find it difficult to imagine such situations arising in the present or near future does not strike us as an appropriate guide to evaluating something as lasting as the Constitution.

Mr. Harris: To follow up on two points that have already been raised. It is strange. I have said to myself, I am going to ask the abortion question too because it has come up a few times and inevitably Vander Zalm is used as the tyrant I suppose, although I have not considered it such. The abortion question, if I understand it correctly--

C-1515 follows





(Mr. Harris)

~~...the tyrant, I suppose, although I am not considered as such. But in the abortion question, if I understand it correctly, I do not think Quebec or any province has any power, any authority, in the abortion question, save and except the health care provision or who is going to pay for it. It is a criminal code matter. It was. That was what was struck down.~~

So other than who is going to pay for it, maybe you know of some legal mechanism by which a province could assume authority and I would be interested in hearing what that is.

Mr. Charnetski: I guess the first thing that strikes me about your question is that you would say--somehow trivialize who is going to pay for it. I mean, is that not a fundamental question as to the actual effectiveness of any provision in the health care system? You are right. You are correct. It is a criminal code--

Mr. Harris: Let us just zero in on one that. Let us not argue about whether that is trivializing it or not.

Mr. Charnetski: OK.

Mr. Harris: But is that the only aspect? There is no other provincial jurisdiction that you are aware of?

Mr. Charnetski: Legally, at this point, it has been decided to be a criminal code issue. If you do not want to argue on the triviality of the money aspect, then we should ??shut up.

Mr. Harris: I do not mind your arguing--but I am not sure that is going to be helpful in the overall debate that is here anyway--maybe it is, under social services, if you want to, or everything being universally the same all across this country.

But as I understand Premier Vander Zalm, he said, ?? "The Canada Health Act said I have to provide medically necessary procedures to cure everybody at no cost, and I have defined this as not medically necessary." I assume that is the function that he is operating under, which presumably allows him to say he will not fund abortion.

Mr. Charnetski: I agree. I think--

Mr. Harris: I am not sure he is treating anybody any differently. I mean, I think he is treating everybody the same.

Mr. Charnetski: I think a number of people would take that as saying, I mean, he is not treating anyone differently but he is treating--the question is women. Our concern in the effect that this has on women.

So while he is not treating anyone differently, the overall effect, people would argue, is that by denying abortions to women, while not treating any single women differently, has the effect of treating women in an inferior ??way. I think that is where the heart of the issue lies.

We use abortion, and particularly, Premier Vander Zalm's and Premier

Devine's positions on this show that it is not some sort of hypothetical, crazy fancy that we put before you. Part of the beauty of law is to find a justification for any position and if the distinct society has the potential to be used as a justification for a position that will inherently hurt women, then it is dangerous.

Mr. Harris: OK. Let me go on to the second, because I am not convinced there is anything pre-Meech Lake or post-Meech Lake that can change what can happen there, but I understand the point you make.

Richard started to touch on this. The distinct society, other than what you have said, is that Quebec is a distinct society, therefore somebody may be able to argue that therefore, they are distinct from what? They are distinct from us and therefore we are distinct and therefore argue, which I think is a pretty long way around arguing.

Is there anything else? Does anything else in section 1 or in section 2, the other clause, on directly recognizing minority rights, is there anything else, other than "distinct society", that gives you any cause for concern? Is it section 1 or section 2? I am losing my marbles.

Mr. Charnetski: Yes, it is the proposed sections to the British North America Act of 1867.

Mr. Harris: Yes, OK, proposed.

Mr. Charnetski: I think the most important part of that section is the "distinct society" and "linguistic duality" part. I could touch on the fact that we do not believe subsection 2(4) in any way guarantees that there is no derogation of power, but I am not sure that addresses your question. I think my quickest answer would be "no." Our concern is with the "distinct society" ??provision.

Mr. Harris: So it really is that, if you are concerned about women's rights or equality rights, it really is then in the province of Quebec?

Mr. Charnetski: I would disagree with that.

Mr. Harris: You would argue, you could argue the original argument that I gave.

Mr. Charnetski: And I would go even further.

Mr. Harris: OK.

~~Mr. Charnetski: Because something fundamental that Quebec women  
?? seem to have forgotten is that a Supreme Court decision.~~

C-1520-1 follows



~~because you would argue that you could argue the original argument that I gave~~

1520

Mr. Charnetski: I would go even further, because something fundamental that Quebec women seem to forget is that a Supreme Court decision does not affect just women in Quebec. It has authority for courts all across the country. As Ms. Pearce touched on, this has a number of levels of effect for us. The "distinct society" provision may not be subject to charter challenge. It may have a negative impact even as just an interpretation clause and it may go even further to somehow affect the general definition of "equality" as a whole.

Mr. Harris: So if a Supreme Court decision is based on a case in Quebec, a distinct society versus an equality right, the decision that comes out of that then, because we are all equal in Canada, would be applicable and be able to be used as an example on a similar rights basis across the country?

Mr. Charnetski: Yes.

Mr. Harris: Others have come before us and argued that, for different reasons, mind you. They have come to argue that "distinct society" for Quebec, whatever result it gives Quebec, it will give everybody else too.

Mr. Charnetski: Bear in mind many justices only look for a hook to hang their hats on.

Mr. Harris: Which reinforces your argument.

Mr. Charnetski: Yes.

Miss Roberts: I appreciated your brief. I would just like to point out something with respect to abortion, just a comment. When you are talking about the abortion issue, you are also looking at equality rights and legal rights and therefore that is the problem with respect to that. It really does not make any difference about Meech Lake or something like that, because if Meech Lake affects equality rights, it will also affect legal rights. The abortion issue is an issue that is between two already entrenched rights in the charter, and that is something else that you have to look at. It is not just the distinct society that is going to impinge upon that equality right for women. The charter itself will do it maybe more than--

Mr. Chairman: Before we settle the abortion issue and allow the federal-provincial attorneys general to get away from their responsibilities, can I, perhaps as a last question, turn to a totally different aspect of the issue? I have no answer to this, but I would really appreciate your thoughts.

I have been sitting here listening to you. I go back to a couple of points in your brief where you noted as young Canadians at university and I was thinking back to when I was not quite so middle-aged and at university, in terms of some of the compelling issues at that time.

I think there is absolutely no question that one of the really interesting developments in this country--and one sees it, not just young people, but young people at university are clearly one group that really feels



Mr. Chairman

C-1520-2

30

March 30, 1988

this--has been the whole elaboration of the charter, individual rights and group rights to a certain extent, if we define women as a group. None the less, the focus has come from a kind of individual-rights perspective.

I go back to my experience. There were a number of issues, but one very definite one in the early 1960s was the relationship between French and English Canadians, what was Quebec's role in Canada and so on. I suppose for many of us, from that point, there has been a kind of handprint on us that will be with us for our entire lives. It was not that one never thought about individual rights, but at that time the consciousness was not there around that particular issue.

I suppose as a younger person, and as I went through the 1960s and happened to be involved in some of the early constitutional discussions, questions of collective rights and in particular the right of Quebec society defined in its French language and French cultural aspect--what were the rights that society had or ought to have in terms of protecting itself. Certainly, it was a minority within Canada and an even greater minority in North America.

As we come forward and look at the charter--and I share and everyone in the committee shares that is very important to all of us for a whole host of reasons--I also have this voice that is coming back to me from the University of Toronto and Laval in the 1960s saying, "OK, but look--".....

C-1525 follows



Mr. Chairman)

~~will be very important to all of us for a whole host of reasons. But I also have this voice that is coming back to me from the University of Toronto and Université Laval in the 60s saying OK but look. I mean I can envisage some worse case scenarios where the protection of individual rights in Quebec could lead to, if you like, the extinction of French speaking Quebec.~~

Now, I do not think that is likely to happen, but I am just saying that there is a line of argument. So as I look at the charter itself, regardless of, you know, Meech Lake, but as I look at the Charter itself and then I look at Meech Lake and at least the initial intent which was to, you know, bring Quebec in and provide some protection along the line that they have been advocating. I am trying to find the balance.

In my understanding of distinct society, which I do not want to see causing all of these various scenarios that we have been discussing, but by the same token, I think that realistically one recognizes that it is within the geographic boundaries of the province of Quebec that French Canada thrives at its, you know, in its most fulsome way, and that we play around with the ability of the Quebec provincial government to somehow protect that.

The federal government is obviously important but the Quebec government's role there is also very critical and so as one approaches the distinct society, in a sense, because we are here in Ontario and we are an Ontario committee, we do not hear a lot from people and do not talk a lot about that sort of element. As perhaps one might have if it was a House of Commons committee. And so I have struggled with that in terms of saying to myself, alright should we absolutely have the Charter override? Nothing in that Charter can be affected at all. I was interested in the comment that you made and your stressing of 15 and 28. I find that interesting and I think there is a line of argument that is compelling. But I am interested in how you see or how you measure, and I do not mean that you are speaking for everybody who is at the University of Toronto law school or at the university, but how do you, Sir, try to balance that? Because, would you agree that there is a need, in some respect, for some defense of the collectivity, if you like and what do we do when that runs into conflict, perhaps with some individual rights? And I know some people will say, well if it runs into conflict, it is the individual right that must take precedence. And I confess, I am—but I continue to wrestle and I do not know what the answer is and I just wonder and I am just musing to see your first thoughts, second thoughts to—

Ms. Pearce: Well, I suppose the quickest answer is that we feel the balance is to improve section 28 and section 15 of the Charter into clause 16 of the Accord and that we feel that still allows for this sort of flourishing distinct society while protecting rights that may feel as Mr. Charnetski has said are of particularly susceptible to being impinged by clause 2 of the Accord. I think perhaps, we hope that maybe around page 7 of our written submission, maybe of some help. There we discussed the and ?? the joint committee's reason for not including women's equality rights in clause, in section 16 of the Accord. I think that around that discussion is when the whole idea of when are we going to be just rendering, you know, section 2, impotent. When are we going to be putting so much into section 16, that section 2 is not going to mean anything. I think that the reasons for putting in the multicultural and aboriginal rights have some validity but I suggest that that validity is applicable to women's rights as well and that women's

Ms. Pearce

C-1525-2

32

March 29, 1988

rights have a lot of similarity to multicultural and aboriginal rights in a lot of ways. That is why we feel it should included.

Mr. Chairman: Thank you.

Mr. Harris: Have you given any thought or any weight to just dropping 16 right out of the Accord?

Ms. Pearce: Go ahead Bill.

Mr. Chairman: Obviously, you have to think about that one.

Mr. Charnetski: Yes, we have. I am not sure we have ever come to a decision on whether that would be a good thing or a bad thing. It was my initial reaction that clause 16 probably had a place in the Meech Lake Accord.

(C-1530-1 follows)





~~whether that would be a good thing or a bad thing. It was my initial reaction~~  
~~that section 16 probably had a place in the Meech Lake accord.~~ Of course, with  
that, as we are all now aware, there is a danger of excluding some and thereby  
somehow trivializing those rights or saying they are not as important as the  
ones that are included in section 16, but I think there would be a danger  
otherwise of trumping the entire charter with sections, such as section 2.

1530

I mean the charter is not the kind of omnipotent provision that maybe  
other aspects of the Constitution are. I think it requires protection. It is  
still in its youth, blah, blah, blah, but I think it is necessary. I  
also think it was something that perhaps was not considered in great detail by  
the drafters. What happened was, you got a clause included that did not pay  
enough attention to its real purpose. I would say it does have a purpose and  
it should be there, but it should be there in such a way as to protect those  
rights that are most susceptible to being trumped.

Mr. Chairman: Just for your own interest, this morning we had a  
submission by the chairman of the Ontario Human Rights Commission, Raj Anand.  
I thought I would commend to you his presentation because he discusses the  
issue of the charter being fully protected or just certain parts. I think as  
future lawyers you would find that of interest.

I know I speak on behalf of all the members of the committee for  
thanking you very much for coming before us this afternoon. It has been a most  
enjoyable and interesting exchange. We very much appreciate it.

Ms. Pearce: Thank you.

Mr. Chairman: Thank you.

Mr. Charnetski: Thank you.

Mr. Chairman: If I could call upon our next witness, Donald Curtis.  
If he would be good enough to come forward and take a chair. Welcome, Mr.  
Curtis. We have a copy of your submission, which is being passed out by the  
clerk of the committee. If I might ask you simply to proceed and make your  
presentation and we will then follow up with questions.

Mr. Curtis: Yes. I might mention I am slightly deaf. You may have to  
talk a little loud to me.

Mr. Chairman: All right.

DONALD CURTIS

Mr. Curtis: Mr. Chairman and members of the Ontario select committee  
on constitutional reform, thank you for permitting me to address you regarding  
the Meech Lake accord. I am a retired General Motors workers. I speak to you  
not as a professional or an intellectual but as the ordinary man in the street.


I oppose the Meech Lake accord for many serious reasons. It jeopardizes  
equal application of the Charter of Rights and Freedoms by recognizing Quebec  
as a distinct society. By requiring that appointments to the Senate be made

from provincial lists, it introduces provincial bias and provincial encroachment on national government. The requirement of annual first ministers' conferences is a further encroachment because these will tend to set the federal government's agenda and Parliament will become a ratification body only. By requiring that appointments to the Supreme Court of Canada be made from provincial lists, it prejudices an institution which, up until now, has worked in the national interest with fairness to all.

It makes the Constitution practically impossible to change because it extends the requirement of unanimous consent of Parliament and all provincial legislators to effect change. The above requirement practically denies the entry of the Yukon and the Northwest Territories to provincehood. Senate reform will probably be denied. The opting-out provision in the accord discourages the federal government from initiating shared-cost programs since it will have to collect the taxes to support them and the opting-out provinces will get the credit.

This provision will hamper an effective response to future challenges regarding employment and social assistance, education, environmental protection, science and technology. It will also impede the mobility of the labour force due to differing criteria--

C-1535 follows



March 30, 1988

(Mr. Curtis)

~~... social assistance, education, environmental protection, science and technology. It will also impede the mobility of the labour force due to differing criteria in each province.~~ Provincial control of immigration opens the door to a patchwork of racially-motivated provincial immigration policies.

The Meech Lake accord is ambiguous. Such phrases as "national objectives" or "distinct society" could be interpreted by the courts in various ways. One of the worst flaws is the recognition of Quebec as a distinct society, requiring it to preserve and promote its distinct identity. This will divide Canada into two nations, permanently solidifying the division between the French-speaking and the English-speaking peoples, rather than encouraging the gradual melding of both races into one Canadian society as at present.

The requirement that Quebec promote its distinct identity is nothing less than providing it with the constitutional right to proceed to sovereignty-association, or even independence. Implementation of the Meech Lake accord could give Quebec the constitutional right to set its own foreign policy, to raise an army, to set up customs barriers to the rest of Canada, to demand from the federal government the exclusive right of collecting its own taxes, all in the name of promoting its identity. This provision is made to order for the Parti Québécois, should it ever form a government, and constitutional right will be on its side.

Another terrible flaw is the massive transfer of power from the federal government to the provinces through the requirement of an annual first ministers' conference, control of appointments to the Senate and to the Supreme Court of Canada, the opting-out provision and control over immigration. This transfer of power will lessen the ability of the federal government to protect the weaker regions of the country, and as the Canadian people tend to look more towards their individual provinces for solutions to national problems, Canada will become less relevant to their loyalty.

I have read where Canada is considered the most decentralized federation in the world. It may be that this has contributed to the threats of separation in Quebec, Alberta and now in British Columbia. If this is so, think of what the Meech Lake accord will do. I believe it will break up Canada. I just cannot understand our political representatives ratifying this accord. It is a treacherous piece of legislation because it is encouraging Quebec to distance itself from the rest of Canada and the rest of the provinces to set up their own little fiefdoms, precursive to the dismemberment of Canada itself. Even if this were not true, the accord should be rejected out of hand because of the many other defects previously mentioned.

Certainly, in the pressure of the moment, and with the knowledge that Quebec would sign the Constitution if the accord were agreed to, I can understand the premiers' initial agreement. But as its implications come to light, our political representatives have to put their country above cheap, political gain and refuse to ratify it.

I would like to know why there is such urgency to enact this Meech Lake accord into law. Why are our political leaders pushing it through despite stiff opposition? What benefit is there in it? Do our political leaders know something that I do not know and that the public does not know? There is no vision of Canada's potential in it. It is regressive legislation pointing...

1540 follows



(Mr. Curtis)

~~public does not know, there is no vision of Canada's potential in it. It is a~~  
~~regressive legislation painting~~ Canada's future into an entirely different direction from that towards which our previous prime ministers, from Sir. John A. Macdonald on, have tried to direct it, changing the country from a relatively cohesive unit into a group of semi-autonomous states. I cannot believe that our political leaders are so incredibly gullible as to think that Quebec's signature on the Constitution is worth this defect-ridden legislation, which provides the tools for Canada's destruction.

1540

Also, while I am asking questions, I sense from the newspapers that these hearings are just a formality, that the ratification of the accord is a foregone conclusion, that no free vote will be allowed. What are these hearings all about then? Are they just a farce? Is no attention going to be paid to what we say? All of these unanswered questions create an impression in the public mind that there is a fear of losing Quebec votes on the part of our federal leaders and shabby, cynical greed for power on the part of our provincial leaders. If this is true, it does not say much for the calibre of the people we are electing to public office.

Now is the time, if ever, for responsibility, honesty and statesmanship. The very existence of this country of ours is at stake with this Meech Lake accord and our representatives must put Canada above leader, party, votes or personal gain. What you should do is to have a free ratification vote and scrap the accord entirely or, better still, do not vote on it at all and let it lapse. It has too many flaws in it to be reworked. Go back to the bargaining table, find out what Quebec's real needs are, and the west too, and make whatever concessions can possibly be given without compromising the integrity of the federal government. Next time do not give away the store.

I believe that an elected Senate with equal representation from each province would go a long way towards alleviating provincial dissatisfaction. We should continue to encourage bilingualism in all parts of Canada regardless of cost or of French population ratios so that a French-speaking person can move to any part of Canada and feel at home. After all, theirs is an official language and they form a significant portion of our population. We must not construct a ghetto to set them apart as Meech Lake would do. If Quebec refuses to sign the Constitution, then perhaps the time is not yet right to do so.

Ontario has a tradition of loyalty, as expressed in its motto: "Ut inceptis fidelis sic permanet; faithful it began, and faithful it shall remain." Let us demonstrate our loyalty to our beloved country, Canada, showing the way to Manitoba and New Brunswick by refusing to ratify the Meech Lake accord.

Mr. Chairman: Thank you very much, Mr. Curtis, for your presentation. Your views are set out very clearly and your conclusion is also very clear. We can turn to questions, and we will start with Miss Roberts.


Miss Roberts: Mr. Curtis, thank you very much for coming today, and I will speak slowly and clearly. If you do not hear me, say so.

Mr. Curtis: I am slightly deaf you know.

Miss Roberts: My voice will shatter glass, a lot of people say, or the people across. I would like you to turn to page 3 of your presentation and there in your second paragraph on page 3 you ended the paragraph by saying that right now there is a general melding of both races into one Canadian society, and this is happening now. What has led you to believe that this is the way it is happening now?

~~Mr. Curtis: Have you heard about--~~

C1545 follows



Miss Roberts:

~~...melding of both races into one Canadian society and this is happening now.  
What has led you to believe that this is the way it is happening now?~~

Mr. Curtis: You have heard about people taking these French immersion course. They cannot get enough teachers for these courses. People want to become bilingual and this is in English Canada. So I feel that there is a gradual awareness that Canada must be bilingual. To get government jobs, in the federal government, for instance, it is a real asset to be bilingual.

I think, probably since there was the threat of Quebec's separation, that people have become more aware that there is a French fact here in Canada, that it is part of Canada to be bilingual.

?? Miss Roberts: Thank you. You are putting that in terms of linguistic

Mr. Curtis: Language.

Miss Roberts: You are putting it in linguistic terms, not necessarily in societal terms, so your Canadian society, the way you look at it, is one that is bilingual.

Mr. Curtis: Eventually, I would think this country would be fairly bilingual.

Miss Roberts: And the French fact would remain as such?

Mr. Curtis: Well, my idea is this. If you make the country bilingual, then French people are not going to stay in the ghetto of Quebec. They are going to move around the country and we are going to become as one people if we encourage this bilingualism.

Miss Roberts: The other theme going through your particular presentation, which is very evident, is your great concern for Canada as a nation.

Mr. Curtis: Yes.

Miss Roberts: And your concern to deal with Quebec and the problem that Quebec has not been a signatory to the 1982 round.

Mr. Curtis: Right.

Miss Roberts: And you have used an expression, I believe, that maybe the time is not ripe.

Mr. Curtis: Yes.

Miss Roberts: My fear--and this is just a comment I would like you to respond to--is that if we do not have Quebec in the Constitution or in the new Confederation, whichever you wish to call it, how are we going to deal with the Senate? How are we going to deal with the aboriginal people? How are we going to deal with--you know.



Mr. Curtis: ??Quebec is, in fact, in the Constitution. Regardless of whether Quebec signed the Constitution or not, they are in the Constitution because there was the required majority in the 1982 Constitution, if you know what I mean.

Miss Roberts: Oh, I understand legally, yes, but they perceive they are not. They perceive they are not and they are not participating in the rest of the development of our country. I find that to be a little disturbing.

Mr. Curtis: Do you really think they are not participating? I guess you are right. Maybe they are thinking of themselves too much right now.

Miss Roberts: I do not know if they are thinking of themselves too much, but in the past, since 1985, I would say, they have not participated, to the fullest extent that they could do so, in developing that Canadian nation that you see.

Mr. Curtis: Well, I think the problem is, now--Alberta is--I do not know whether you have read Don Braid, I see him in the Star. He is a columnist. He was saying that Alberta may pass a law making that province unilingual. How many French people, whose mother language is French, are going to settle in Alberta? If every province did that, they are going to be forced back into Quebec.

It becomes a ghetto and then we definitely have our two nations. We do not want two nations in Canada. We want them to come together gradually. I think the way you can do it is by encouraging bilingualism to the extent that it is possible. And I think it has been very encouraging, because I think that the people of Canada, the English-speaking people of Canada, have taken to it and they are trying to become more bilingual.


Miss Roberts: Thank you for your comments. I do appreciate them.

Mr. Chairman: Mr. Offer.

Mr. Offer: Thank you very much, Mr. Chairman. Thank you for your presentation. Just to carry on with Miss Roberts' point, on page 3, the same clause, you talk about the distinct society and then you talk about the division of French-speaking and English-speaking peoples.

We have heard a great deal of information that the distinct society in Quebec is not solely its French ...

C-1550-1 follows



~~... great deal of information that the distinct society in Quebec is not solely~~  
in French and English languages; but rather a whole raft of other characteristics in Quebec which are not in other provinces.

1550

Mr. Curtis: Yes. Right.

Mr. Offer: It is not anything new, but it is a fact. The judicial system and many other characteristics within Quebec make it almost a-- It has been told to us on a number of occasions it is a sociological fact of the distinct society distinctness of Quebec. If you agree with that, then what I would like to do is hear your concerns as to what real harm there is in acknowledging that distinct society of Quebec.

Mr. Curtis: I guess you have to acknowledge that there is more distinctness in Quebec than there is in the other provinces, but each province is distinct. Why say Quebec is distinct? They are all distinct. But yes, I agree that there are other things besides the language that are distinct about Quebec, but I think that we want to become a Canadian nation. We want to become one people some day. It will not be in our generation. It will not be for a long time. But what we want to do is encourage it among the English-speaking and the French-speaking people.

We want to make it that if somebody in Quebec can get a job out in Alberta, say in Calgary, he goes out there and he can feel at home and he will settle there. We do not want to force him back into Quebec and make it like a ghetto. I do not know whether I have answered your question. Have I?

Mr. Offer: Certainly what I wanted to hear, and what I have heard, are your concerns with respect to the whole question of the distinct society and I think it is very important that you come before this committee to outline these concerns. You have touched on some of the most major issues which we have been talking about since day one and I think it is important that not only the large association and the large groups come before us, but also individuals coming before us and telling us their opinion. I thank you for that because it is extremely important for us as a committee to hear that before we go into our deliberations.

Mr. Curtis: I hope that the two language groups would mingle together some day. It will not be in our time, but I am looking forward to some day--I will not be around--when we are one unified country. I think the only way we are going to do it is encouraging this bilingualism so that a French-speaking person will not have any qualms about moving to Saskatchewan or British Columbia or wherever he wishes. . .

Mr. Harris: I want to ask you something, and I do not ask it facetiously because I have asked other people this as well. We have heard a lot about how Meech diminishes provincial powers, takes away from having national programs, everybody is treated equal, the level of service is the same across Canada--

Mr. Curtis: You are talking about the opting-out provision.

Mr. Harris: I am talking the whole gamut. I want to talk about

Mr. Harris

C-1550-2

41

March 30, 1988

everything. That is part of it and you have mentioned it.

Mr. Curtis: Yes.

Mr. Harris: You talk about provincial involvement in the Senate, provincial involvement in the court system. On the language issue your vision of Canada is everybody fluently bilingual across the country. I think that was Trudeau's vision of Canada as well.

Mr. Curtis: I do not think everybody will be bilingual, but it will be generally that.

Mr. Harris: But you think of each province being bilingual enough that francophones will feel comfortable in Ontario, in Newfoundland and in Alberta as they do in Quebec.

Mr. Curtis: Exactly. Yes.

Mr. Harris: And English vice versa. That is your vision of ??

Mr. Curtis: I do not like to see the English-speaking people in the rest of Canada and the French holed up in Quebec. That is going to make us two nations. If we can encourage the French-speaking people to go to the other provinces to settle there, to mingle with the English-speaking people, we are going to become one country.

Mr. Harris: OK. I am not 100 per cent sure, and I am sure you do not use the term "ghetto" in a negative connotation--you used it.

C-1555 follows.



~~with the English-speaking people, we are going to become one country.~~

Mr. Harris: I am not 100 per cent sure--I am sure you do not use the term "ghetto" in a negative connotation; you are saying that there will be all French there and no English.

Mr. Curtis: I do not mean it negatively against the French-speaking people.

Mr. Harris: But I want to ask this question--and I have asked others--if everything is going to be this way, is there any need to have provincial governments and provinces at all? Why do we not just have one country?

Mr. Curtis: A unified country. Yes, there have to be because there are other problems besides this problem. There are local items that are of concern to a particular region. There are different features of geography and different groups that settle in different parts of the country. So yes, I would say there have to be provinces, because there are items that are common to that particular region that have to be handled by the region itself. So therefore, there are reasons for the different regions, the different provinces.

Mr. Harris: I get a sense, when you talk about provincial powers--you talk about it and others have talked about it--that you are totally opposed to Meech Lake because it gives too much power to the provinces.

Mr. Curtis: Yes.

Mr. Harris: When we talk about the opting out, yet the only powers we are talking about there are provincial powers. They are provincial powers because each province has been a little bit unique, each province has been a little bit different, and over a period of time there has been agreement that the federal government will look after these things and the provincial governments will look after these.

We recognize that things are different. An education in Newfoundland might be a little different and have to be a little different in that fishing village in Newfoundland than it is on the farm in Alberta. So it has evolved as a provincial responsibility.

Mr. Curtis: Yes.

Mr. Harris: This power you are talking about that is so terrible is the provinces' power. It is their right, it is their mandate to carry it out. Meech Lake says: "If the federal government wants to stick its nose in there, we want to have some say as to what it is. We are going to have some involvement, because it is our power. It is our right to do it. It is why we exist as a province." I am being a little bit provocative, if you like.

Mr. Curtis: That is all right.

Mr. Harris: I am trying to do it because I get a sense that your vision of the country is that everything will be the same in all parts of our country. I guess my vision of the country is that I do not think that will

Mr. Harris

C-1555-2

43

March 30, 1988

ever be possible, but I think we can still exist as a very strong country if we recognize regional differences, geographic differences and even "distinct society" differences that Quebec wants recognized, and work together on those things that we do have in common, respect those things that others have different and let them operate a little different.

That is the way it appears to me this country is coming together now, but I sense that is not your vision and I sense it is not Trudeau's vision. Most people who come in and express concern around these aspects of Meech Lake say: "No, that is not my vision of Canada. I see Canada as the same all across."

Mr. Curtis: No, I think you are generalizing too much. There are certain things like maybe certain social policies, education and so on, that should properly belong to the provinces, but there are times when it is necessary for the federal government to intervene. They intervene in unemployment insurance, Canada pension and things like that, that were really the jurisdiction of the provinces.

Where would we have gotten if the provinces had kept this to themselves? We would get a patchwork of different legislation, and I do not think this would be good. I think it is good that it is spread over the whole country so that it is all the same. If somebody is unemployed in Ontario, he can go out to Alberta and get the same conditions and so on.

There are always going to be certain items that will be different from region to region, but I think it is necessary for the federal government to be strong enough to be able to intervene and level things. I do not know whether I have answered your question. Have I?

Mr. Harris: I think you have. I just

C-1600 follows



~~necessary for the federal government to be strong enough to be able to  
intervene and level the playing field. I cannot remember whether I have answered  
your question. Have I?~~

1600

Mr. Harris: ~~think so, may be~~ I think that unemployment insurance evolved without anything being in the Constitution. Provinces got together and they agreed and it was not the federal. The federal had to get permission of all the provinces and Meech just legitimizes that processes and puts in the Constitution and says indeed. In fact, by the provinces signing this agreement, it says the federal government can come in to provincial jurisdiction with a national objective program. It sets out a few conditions how it will work.

Mr. Curtis: Do you think that they would have gotten as strong a legislation if the provinces had the power they are going to get with Meech Lake? If there is more power that evolves into the provinces, do you think that they would get as good a legislation? It is the strength of that federal government--

Mr. Harris: I do not think there is a sense that there has been really any shift of power there. There has been a few shifts in that provinces are getting a little more formalized, say, in the Senate, in the appointment of judges, but as far as national programs go in areas of provincial jurisdiction, I do not think the provinces have any more power than they had before. Before, it was exclusively theirs.

Mr. Curtis: Yes.

Mr. Harris: No, it is a recognition that the federal government not only has the right but it may be desirable in that negotiating process.

Mr. Curtis: My feeling is that if you give more power to the provinces, they are less likely to co-operate. You have to have sort of a big stick over them, in a way, to get the legislation that is needed perhaps.

Mr. Chairman: On behalf of the committee, I would like to thank you very much for having joined us this afternoon. You have provided not only a number of things for us to consider but you clearly have expressed those with some passion and feeling. We have noted at different times during our hearings that this is not just some dry legal text or dry legal issue, but that a constitution, after all, reflects at least in part, what we hope our country is all about. So we thank you for the frankness and the honesty of your opinions as you have expressed them today.

Mr. Curtis: Do you mind if I make one more point?

Mr. Chairman: Please.

Mr. Curtis: I did not put it in my speech because it is political.

Mr. Chairman: We cannot escape that in this room.

Mr. Allen: We better go in camera--



Mr. Curtis: The party that has been hurt the most or has had the most trouble with the Meech Lake accord has been the Liberals and the reason why I think the Liberals have had the most trouble is because they believe in strong central government and they are strong for the individual.

I think if the Premier (Mr. Peterson) forces through this Meech Lake accord, ratifying it, he is going to alienate the Liberals in this province and especially, important to him, are the Liberals who vote Liberal federally and Conservative provincially. They have swung over to the Liberal side this last time. He might find he is out of a job if he puts through this Meech Lake accord.

I just have to say it.

Mr. Chairman: I am sure he will get the message.

Mr. Harris: Shove it through.

Mr. Chairman: Mr. Eves and Mr. Harris, if no one else, I am sure will carry that forward. Thank you very much for being with us this afternoon.

Mr. Curtis: Thanks for listening to me.

Mr. Eves: Can we have a written guarantee from Mr. Curtis.

Mr. Chairman: We will put it in the revised accord.

If I could then call upon our next witness, Mr. Edward Carrigan. Please be good enough to come forward. We have a copy of your presentation which I think everyone has now received. If you would like to lead us through it and then we can follow up with questions when you have concluded.

EDWARD CARRIGAN

Mr. Carrigan: I thank this committee for receiving a submission of mine on the Meech Lake constitutional accord.

The national government of Canada represents the shared property and the common possession of all 26 million Canadians and its authority and powers must not be casually expropriated by provincial governments to gratify cynical regional ambitions. Its authority to protect jobs, wealth and collective interests of Canadians and of future generations of Canadians must not be ...

C-1605-1 follows



(Mr. Carrigan)

~~This authority and powers must not be casually expropriated by provincial governments to gratify cynical regional ambitions. Its authority to protect the jobs, wealth and collective interests of Canadians, and of future generations of Canadians, must not be discarded in order to accommodate expansionist provincial ambition, and the cowardice and lack of national zeal of the incumbent in the Prime Minister's office.~~

The national government represents a vital element of the collective strength of the Canadian people, and is a unique instrument of their collective will. Its powers must not be weakened for vicious, transitory political purposes.

Mr. Chairman: Excuse me, Mr. Carrigan. Would you mind going a bit more slowly for the interpreter. This is going out all over the province in both English and French. Help us a bit. We have time.

Mr. Carrigan: I am sorry. The Meech Lake accord provides for the provincial selection of lists of candidates for appointment by the national government of members of the Supreme Court and of Senators. This would represent a fatal diluting of the natural and necessary authority of the national government to assert the national interest against regional rivalries and foreign intervention. The persons whose names would be put on those provincial lists are precisely those who would be beholden to provincial premiers, and would be eager to present provincial demands to the national government. Those demands would almost invariably run counter to the broad national interest.

The proposed dramatic change in the selection of members of the Senate, whereby the provincial governments would have a decisive hand in the process, would result in the termination of the suspensive veto, whereunder the Senate, in the interests of its survival has, for the past three decades, discontinued the exercise of its right to veto legislation enacted by the House or Commons.

Under this provision of the Meech Lake constitutional accord, the provincial governments gain a means of vetoing national legislation and would be enabled to intimidate the national government into artificially restraining its legislative initiatives. Under the Meech Lake constitutional dispensation, the national government would choose members of the Supreme Court from lists of candidates drawn up by provincial governments. This is a morally indefensible abridgement of the necessary authority of the national government. The evolution of constitutional doctrine in Canada in the past few years has moved in disregard for both popular opinion and the imperatives of our British constitutional traditions in the direction of strengthening the authority of the non-elected courts at the expense of the elected legislatures.

It would be a dire threat to the capacity of the national government to discharge its responsibilities if provincial governments were to allow to influence the appointments of persons to serve on the national Supreme Court. It is my conviction that, in the interests of preserving the due authority of the national government, the Meech Lake constitutional accord must be cancelled.

Subordinating the national government to the provincial premiers flies in the face of Canadian constitutional tradition. Following the bloody civil war that preceded the British withdrawal from what has become the United States, the US state governments agreed to transfer some of their authority to

H. Carrigan

federal government. The state governments preceded the federal government and, on their own initiative, has wrested full autonomy from the British government. The British government was replaced by 13 state governments, who then decided to bestow some of their authority upon a newly created central government, which came into being as a result of their initiative.

The powers of a national government, which the Canadian government received in 1867, were not assigned to it by the preceding colonial governments because they were not nations but colonies. These powers were received from the imperial government in London. Simultaneous with the creation of the national government, provincial governments were established in Quebec and Ontario, replacing the government of the United Province of Canada. Six of Canada's 10 provinces were created by the national government and Newfoundland was admitted to the Canadian federation as a crown colony. Under the British North America Act, all rights not specifically assigned to the provincial governments, automatically accrue to the national government, whereas, under the US Constitution, all rights not specifically assigned to the federal government, automatically belong to the state governments. The primacy of the national government is enshrined in Canadian constitutional practice and should not be diluted now.

Canadians are entering a dangerous period of world history. The US share of world steel production in the 37 years between 1947 and 1984 dropped from 52 per cent to 11 per cent. In other important industrial categories, the United States has suffered comparable declines. The era of a bipolar world comprising a strong United States opposing a weaker Soviet Union, has ended. In the future there will be several power centres whose strength is equal to or greater than that of the United States. Already Japan, the Soviet Union and the member nations of the EEC have industrial production levels in many categories which are higher than those of the United States. A strong national government will be required by Canada to counterbalance the outside forces which will be brought to bear on this nation by the expanding centres of world economic power and strategic influence.

The drive to divest the national government of its powers does violence to the great vision of Sir John A. Macdonald, of building a powerful transcontinental national in Canada from sea to sea. At the constitutional conferences leading to the establishment of Canada he rejected proposals ...

1610-1 follows





(Mr. Carrigan)

~~transcontinental nation in Canada from sea to sea. At the constitutional conferences leading to the establishment of Canada, he rejected proposals that the provincial government should nominate members of the Senate. Conspicuously, the Meech Lake proposals contain no recommendations that provincial senates be established whose members will be drawn from lists made by the national government.~~

1610

Macdonald called for the creation of a strong national government which would be able to counteract the disintegrating trends which overtook the America Union in the US civil war being waged concurrently with the early Canadian constitutional discussion, which resulted in 600,000 deaths. The immortal vision of Sir John A. Macdonald of a nation developing an empty interior, withstanding US domination and becoming a major world power, under the authority of a strong national government, has been vindicated by events.

Can anyone say that the vision of Sir John A. Macdonald was a fallacy which now deserves to be repudiated? Can we contemptuously set aside 121 years of continuous progress and plunge our future into uncertainty?

The Meech lake accords propose to reverse the course of constitutional history traced out by the United States. That nation began with a virtually powerless national government, and having seen the error its ways, devised a Constitution which provided for a strong national government.

The first US Constitution, the Articles of Confederation of 1781 created a central government almost devoid of powers. That national government could not levy taxes, nor could it borrow money on its own authority. Its revenues consisted of voluntary contributions from the state governments, which were often in arrears.

Under the articles of Confederation, seven US states were issuing their own paper currency, and nine had their own navies. One state, New Jersey, had created its own customs service, while Virginia had felt emboldened to ratify a peace treaty on its own authority. The weak articles of Confederation made it impossible for the United States to comply with the British-US peace treaty ending the civil war leading to US independence and the United States was denied the right to occupy the western lands assigned to it under that treaty.

Powerful US economic forces, the major banks, the huge frontier land corporations and large land-owners and merchants, found it excessively unstable that the territory and interests of their nation could not be defended by a strong national government. The US Constitution of 1789 provides for a strong national government to withstand the inroads of expansionary foreign powers, to undertake the development of vacant lands in the west, and ensure the universal administration of laws throughout the territory of the United States.

Canada's vital interests require a strong national government. It must guide this nation along a course leading to it becoming one of the 10 most important industrial powers in the world. Canada is the world's most important geographic entity, poised between the five great power centres of the modern world, Japan, the Soviet Union, Western Europe, China and the United States. It occupies the world's second greatest land mass, and its size and geographic position inevitably will attract the greedy attention of other world powers. A

strong Canadian national government must provide a strong countervailing influence to foreign incursions into Canada's economy and territorial integrity.

The drive by Meech Lake's accord favouring decentralization would make the exercise of such a countervailing influence difficult.

The proposal to choose senators from lists drawn up by provincial premiers guarantees that Canada would be rendered ungovernable, and that democracy would be permanently nullified. The Senate of Canada has been granted the authority under the British North America Act, which the Meech Lake constitutional proposals do not propose to alter, to veto legislation passed by the House of Commons.

The Senate last exercised this authority in 1960, when it vetoed trade legislation proposed by the Diefenbaker government. But the Senate's authority to veto legislation passed by the democratically elected House of Commons remains unimpaired, notwithstanding its refusal to exercise that authority in the past 28 years.

The Senate voluntarily refrains from exercising its veto rights over legislation emerging from the House of Commons. This has spared Canadians the sight of the Senate vetoing laws enacted by the House of Commons, but the Senate's veto rights are only held in reserve, to be revived at the time and manner of its own choosing.

Under the Meech Lake constitutional proposals, senators chosen with the active intervention of provincial premiers, whose agendas would inevitably and often diverge from the policies of the national government, would find it intolerably irksome that they could not veto legislation originating in the House of Commons. Premiers craving the right to participate in the selection of senators are hardly likely to be satisfied if their candidates, after becoming senators, are without the authority to veto laws passed by the House of Commons.

The senate envisaged under the Meech Lake accord would insist upon reacquiring an exercise in the right of veto.

The democratically elected House of Commons under the regime provided for under the Meech Lake constitutional proposals, would find its legislation blocked by a legislative body whose members were not subject to the democratic discipline of periodic popular election.

The electorate of Canada would inevitably find that the legislators it has voted into office, the members of the House of Commons, were unable to implement the promises on the strength of which it had elected them.

The people of Canada would find that their votes were valueless, because their democratic decisions were overruled by legislators who had been chosen to further the convenience of provincial premiers and were not subject to dismissal at the polls. Democracy under these conditions would be nullified and the elected members of the House of Commons would be the slaves to senators answerable to neither the national electorate--

C-1610-1 follows



(Mr. Carrigan)

~~promises on the strength of which it had elected them.~~  
~~The people of Canada would find their votes were valueless because~~  
~~their democratic decisions were overruled by legislators who had been chosen~~  
~~to further the convenience of provincial premieres and were not subject to~~  
~~dismissal at the polls. Democracy under these conditions would be nullified~~  
~~and the elected members of the House of Commons would be the slaves to~~  
~~senators answerable to neither the national electorate nor the national~~  
~~interest.~~

Provincial government participation in the selection of senators would result in the presence at the centre of national decision-making machinery of persons whose objective is not the pursuit of the broad national interest, but the advancement of narrow provincial purposes. This would result in the paralysis of the national legislative processes.

The provincially sensitive senators would find themselves continuously vetoing legislation originating in the democratically elected House of Commons because it was displeasing to their ideals which emphasized the primacy of provincial governments, and provincial rights. Endlessly, legislation originating in the House of Commons would be repudiated by the nonelected Senate.

The policy positions of the House of Commons and the Senate would be continuously divergent, since they would be answerable to divergent constituencies, and would be subject to divergent terms of office. The House of Commons would be elected by the Canadian people at large, whereas the Senate would be composed of persons sanctioned by provincial governments.

The members of the House of Commons would be subject to replacement every four years, while senators would be appointed until retirement age. Legislation which reflected the wishes of the House of Commons would not receive the approval of senators, while legislation appealing to senators would seldom appeal to a democratic House of Commons.

The consequences of deadlock between two national legislative bodies is illustrated by the experience of Australia in 1975. The government of Prime Minister Gough Whitlam was unable to get legislation which had been passed by the House of Representatives passed by the Senate of Australia. In consequence, the government of Australia was plunged into crisis, and the Whitlam government was dismissed by the Governor General, although it still commanded a majority of the House of Representatives.

It would be virtually impossible to bring popular legislation out of any Canadian parliament resulting from the Meech Lake constitutional proposals. Canada would be rendered ungovernable, as legislation favoured by the House of Commons was rejected by the Senate, and the values of an unelected Senate comprising provincial nominees were necessarily ignored by the House of Commons.

The purpose of constitutional change in Canada must be to enhance the governance of Canada, not to create perpetual deadlock. The Meech Lake constitutional proposals respecting the selecting of members of the Senate would render Canada ungovernable.



Mr. Carrigan

It is a blatant definance of all democratic ideals, and the defensible purposes lying behind the framing of a national constitution, that 11 heads of government should devise what is virtually a new constitution in a couple of days of deliberation behind closed doors. It is furthermore objectionable that the process of constitutional change should be confined to the degrading process of provincial governments stripping the national government of its authority and duties, while a pusillanimous national prime minister smilingly presides over the liquidation of the national government which has served the Canadian people so well for 120 years.

The 11 Canadian governments involved in the constitutional vandalism known as the Meech Lake accords were not elected by the Canadian people to devise a new national constitution. The months preceding the notorious Meech Lake constitutional discussions of May 1987, were not marked by intensive debate among the people of Canada about the need for, or composition of, possible constitutional changes.-

Democracy, and the urgent national interest require that the drawing up of constitutions be arranged differently. Brazil in 1986 was confronted with the task of drawing up a constitution to replace the document which the Brazilian army had dishonoured in 1964 with a coup d'etat. To draw up this constitution, the Brazilian people were asked to vote for members of a National Constituent Assembly in November 1986.

The 559-member constituent assembly is slated to complete its deliberations in April 1988, which means that the process of writing a new Brazilian constitution will have taken 17 months, and is off by full-time the attention of 559 leaders.

Already, the constituent assembly has moved towards adopting a parliamentary form of government in which the critical national office will comprise a prime minister answerable to the national Legislature.

This would be a departure from the historical Brazilian constitution, based on the United States model, and Brazil used to be known as the United States of Brazil over the years, which stresses a strong president serving as both chief of state and head of government. Among the constitutional amendments being considered as one barring foreign ownership of Brazilian industry.

The members of the National Constituent Assembly were chosen by Brazilians in a national election, in democratic fashion, and they were specifically and exclusively charged with the task of devising a new constitution. They are not full-time politicians engaging in writing a new constitution as a part-time activity..

Spain adopted a comparable procedure to devise a new constitution following the death of Francisco Franco, and in 1978 it put the results of these deliberations to a national referendum for popular ratification.

A constitution represents a nation's soul and is the principal embodiment of its collective national purpose. It must be created, and modified, with scrupulous care and deliberation. Its modification in any significant way must be undertaken only after the most intensive and inclusive national debate. The select circle of Canada's heads of government, currently engaged in carving up the national patrimony to gratify provincial lusts,

1620  
follows



~~if any significant way must be undertaken only after the most intensive and inclusive national debate. The select circle of Canada's heads of government engaged in carving up the national patrimony to satisfy provincial~~  
must take the Canadian people into his confidence.

1620

Exhaustive consultation with the mass of the Canadian people must precede any major constitutional change, if it can be established conclusively that the Canadian people wish to see their Constitution changed in a major way.

Constitutional change must deal with more than the division of powers between the national and provincial governments, with ambitious provincial governments grasping increased authority at the expense of the national government and a compliant Prime Minister endlessly capitulating to provincial demands.

Constitutional change should press for enhanced political democracy, enhanced social democracy, and enhanced economic democracy. To achieve enhanced political democracy, Canada should emulate many European nations and introduce proportional representation and thereby ensure that the division of seats in general elections among political parties correspond to their respective proportions of the votes received.

This change would prevent the electoral absurdity of the national Progressive Conservatives in the September 1984 national election receiving 50 per cent of the votes cast and 75 per cent of the seats at stake. It would prevent a national government presuming to undertake concurrently the dismemberment of the national government through the Meech Lake constitutional accords and the Canada-US economic integration accord.

Future constitutional changes in Canada must embrace full social justice by guaranteeing the public financing of four major social functions, health care, education, the living costs of children, and the living costs of the aged. Canada has moved towards such public financing, but much remains to be done, and this public financing must be guaranteed in a future constitution. Exactly as earlier constitutions guaranteed political rights, future constitutions must guarantee social rights.

Future constitutional changes in Canada must embrace economic justice, which would entail guarantees providing for full employment, decent adequate housing for all families at reasonable cost, and, in the absence of full employment, adequate public income under such programs as unemployment insurance and the Canada assistance plan.

Canada's constitutional discussions must not only deal with the division of powers, but must address much broader issues, which contemporary constitutions are designed to deal with.

For constitutional change to be expressive of the democratic ideal, there must be a direct process of interaction between the national government and the people of Canada whom it is designed to protect, and whose property it is.

The proposed Meech Lake constitutional accords would require the approval of all 10 provinces in order to introduce changes in the character,

*Mr. Carrigan*  
composition and operations of such national government institutions as the House of Commons and the Senate. This proposal ensures that any future changes in these national institutions would only be possible in the direction of enhanced provincial influence at the expense of the national government, rather than in favour of the stronger national government which the vital national interests of Canada will require.

Unanimity in constitutional change is a sure prescription for deadlock, unless the change favours the provincial governments at the expense of the national government. Federal systems are successful only if there is a balance maintained between the necessary authority of the central government and provincial autonomy and constitutional change favouring provincial autonomy at the expense of necessary national authority would be injurious to the national interests.

In the 18th century, a democratic Poland possessed a national legislature whose decisions could only be arrived at through unanimous consent. It proved an easy matter for the Russian government of Catherine the Great to bribe individual members of the Polish assembly, and thereby prevent the passage of legislation.

The problems caused by Russian intervention and bribery led to stalemates in the Polish national legislature, and it became an easy matter for Russia to annex large areas of Poland, and finally for Russia, Prussia and Austria to divide Poland among themselves and eliminate it as an independent nation.


The process of future constitutional change should not be dependent upon the goodwill of every single one of Canada's 10 provincial governments. This would mean that a single province with only two per cent of the nation's population could veto future change.

It is difficult to suppress the suspicion that the framers of the Meech Lake constitutional proposals have introduced the requirement for unanimity for future changes to make their proposals irreversible. This is subversive to the ideal of democracy. They propose to weaken the national government to the advantage of the provincial governments, and to render this significant change, which is unlikely to bear the support of the majority of Canadians, permanent and no longer subject to modification.

The proposed Meech Lake constitutional accords must be seen in the light of the proposed Canada-US bilateral economic integration accord. This major upheaval in Canada's economy and social structure would massively reduce the authority of the Canadian government, by taking control of such matters as curbs on foreign indebtedness, energy exports and pricing, and financial institutions away from it.

With one swift blow, the Canadian government would be surrendering huge chunks of its powers to a hostile United States, whose ambitions respecting Canada are inevitably in conflict with Canadian interests and popular--

C-1625-1 follows





~~energy exports and pricing and financial institutions away from it.~~

~~With one swift blow, the Canadian government would be surrendering huge chunks of authority to a hostile United States, whose ambitions respecting Canada are inevitably in conflict with Canadian interests and popular opinion.~~  
The Meech Lake constitutional proposals would balance the proposed bilateral economic integration pact by transferring authority from the national government to the provincial governments, which have proven much more hospitable to US debt and US ownership.

It is difficult to dismiss these two initiatives as a single package designed to clamp suffocating US economic and political control on Canada. The proposed bilateral economic integration pact would deprive the Canadian government of the authority to oppose US wishes respecting such vital matters as US corporate ownership and energy production and pricing.

The Meech Lake constitutional accord would reduce the capacity of the national government to repudiate the costly bilateral economic accord in the future. The Meech Lake constitutional accord would reinforce the bilateral economic pact and would be seen as designed to produce precisely this effect. Canada can afford neither of these initiatives. They are both subversive of Canada's critical national rights and of the strong government required to enforce these rights.

Many of us are hoping that at least one of Canada's premiers will rise above parochialism and strike down the Meech Lake constitutional accord and its essential drive of making Canada irredeemably weak and therefore more susceptible to US strategic domination and economic plunder. I hope the members of this committee will consult their consciences and recommend that the Ontario government refuse its endorsement of the Meech Lake constitutional accord.

I thank you for your patience and attention.

Mr. Chairman: Thank you very much for your submission. I would just note as well the two articles that are attached to it. I think your focus has been different again and interesting in looking at problems faced in the 1980s and looking into the next century. The reference to Brazil is an interesting one in terms of both how they are proceeding and what it is they are wrestling with, as well as some of the other international references that you make in your paper.

Mr. Offer: Thank you very much for your presentation. In the last part of the presentation it talks about process. We have heard a great many submissions surrounding this whole question of process, the perceived shortfalls, the lack of public input prior to the signatures. I know you are well aware of that. The accord itself calls into play these types of constitutional conferences on a yearly basis, the demand for a process or a framework to address public concern with respect to whatever type of issue might be discussed.

The question I have is, on page 11--and I just want your comment on this--you talk about future constitutional change in Canada and you talk about the embracing of full social justice by the granting of public financing of major social functions, health care, education. It goes on to talk about the

Mr. O'Flaherty

C-1625-2

55

March 30, 1988

guarantee providing full employment, decent adequate housing for all families at reasonable cost. No one would take issue with that.

My question to you is, are those issues, notwithstanding how very important they are, the subject matter for constitutions as opposed to the Constitution outlining some framework of reference, and these are issues which governments who are ??seized with those particular powers must address? I would like to get from you your thoughts as to whether they should be the subject of constitutional change as opposed to something that is very much an issue-oriented matter, and if so, why?

Mr. Carrigan: I raise that because the constitutional changes proposed under the Meech Lake accord simply address for the most part the division of powers between two levels of government. I submit that the Constitution of Canada addresses much broader issues and should address these much broader issues. For instance, the US Constitution embodies the principle of separation of church and state. I do not necessarily agree with that. The point is it says that the question of the separation of church and state should be embodied in the Constitution. You can put in the Constitution whatever you think is right and represents a right.

The earlier Constitution of the 18th century tended to stress both the reduction of the authority of such things as the aristocracy, the church and the monarchy, and political rights, the right to vote and the right to participate in the political process. I think that future constitutional changes ...

C-1630 follows

(Mr. Carrigan)

~~Earlier constitutions in the 18th century tended to stress both the reduction of the authority of such things as the aristocracy, the church, the monarchy, and political rights, the right to vote and to participate in the political process. I think that future constitutional changes must, in time, increase social rights and economic rights much more than just the division of powers between two levels of government. I think that these are, indeed, appropriate matters for constitutional change.~~

1630

I would submit this kind of constitutional change is probably several decades away and it would result from the formation ?? public opinion. So that you have a consensus preceding recognition of the embodiment of these rights in the Constitution, but these are entirely appropriate and logical components of any future constitution. The Constitution need not just address the division of powers between two levels of government ?? I think they are in many respects almost a spiritual document expressing the will and character and purposes of a given nation.

Mr. Offer: In your answer, you have also answered my supplementary which was to be the whole question of the evolutionary aspects of this proposal which you are making with this thought or vision of yourself that this is somewhere off in the future. But if that is the case, and without commenting for a moment on whether one agrees or disagrees, surely there is going to be demanded by people a framework of reference within the process to deal with these issues where people do input into the agenda for constitutional reform, whatever it might be in the future, and as people are becoming more and more aware how their rights and interests are affected by the Constitution so will be the greater demand for this type of process.

I am wondering if you can share with us any thoughts you might have as to the type of process that we might want to think about for these types of constitutional conferences, these constitutional agendas for the future, to give greater impact to public input?

Mr. Carrigan: The process which has been employed in many countries over the years is that of a constituent assembly whereby people directly elect people for drawing up a constitution. This usually follows some kind of crisis. For instance, after the Second World War, you had new constitutions in France and Italy and various other countries, again, in Brazil, you had the replacement of a military dictatorship, and you have constituent assemblies whereby people directly vote for representatives whose sole purpose would be to devise a constitution.

Actually, I think American state governments have recourse to that and the American Constitution does provide for the calling of a constituent assembly should there be a need for a broad constitutional change--it has never been exercised in the last 20 years or so--and American state governments have also constitutions with I think one or two exceptions and they do have constituent assemblies.

If, in fact, you are talking about broad constitutional change rather than just sort of incremental change in a little while, I think that anything short of that would be pointless. I do not see how you can take governmental leaders who are not elected, after all, to frame constitutions to take time



Mr. Carrigan

C-1630-2

57 March 30, 1966

out from their work to just draw up a new Constitution. It seems to me to be intolerably casual and involve little direct participation of people particularly when there is no urgent demand for a change in the Constitution and there is no evidence of any spontaneous wish by people to change the Constitution.

What you have is a process whereby certain provincial governments demand more powers and the central government, in fact, yields and grants more powers.

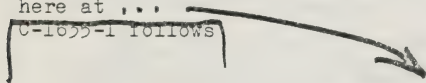
Mr. Offer: You are saying there should be, with respect to any broad constitutional reform, constitutional change, people ought to be specifically elected by constituents for that purpose.

Mr. Carrigan: ?? for something about every three years or so or something like that.

Mr. Offer: I guess the corollary, this might not even be a corollary, but an alternative is that you do not see the legislators elected in the way in which we are all elected as having a mandate to embark upon this type of constitutional reform at any level of government?

Mr. Carrigan: If you are looking upon broad sweeping constitutional reform, unless again these were sort of questioning and were issues in the election which led to their selection, I do not see how it could be and I do not think that in any election we have had these as issues. People have not said, "Let us go run for or against this person on the grounds of his position on the Constitution." There are other issues in the elections. We are looking here at . . .

C-1635-1 follows



(Mr. Carrigan)

~~...so that is - I do not see how it could be because I do not think, in any election you have had, that these are issues. People are not going to say, "let's go run for or against this person on the grounds of his position on the Constitution." There are other issues in the elections.~~

~~We are looking here at~~ that change in the Constitution. There are two things. First of all, there are broad, sweeping changes, major changes. In a select committee you have the process of future change which, in fact, makes the current changes irreversible except in the direction of ?? provincial rights.

I think that, if you are looking at broad changes, yes, there should be some sort of democratic participation, such as a constituent assembly, which has indeed been broadly used throughout history.

Mr. Chairman: Mr. Allen.

Mr. Allen: Thank you, Mr. Chairman. I want to say to Mr. Carrigan that I appreciate an unusually thoughtful presentation whose range of reference certainly rivals, and may exceed, most of the presentations we have had before us. One would like to have a rather relaxed seminar, I think, around this paper, rather than a few questions back and forth.

I was struck by your emphasis on the relationship between the changing pattern of world power on the one hand, and what that might imply in terms of future Canadian need in our own nation, because that is certainly a question, at least, a perspective, which has not been put to us before. It is one that I am going to want to think about a good deal.

I would gather that you feel very strongly opposed to any move away from what we have historically characterized as a parliamentary system of government and that the devolution of authority in the Canadian case, from Great Britain, is the way in which things properly happen, because they do tend to cluster authority closer to the centre, rather than to disperse it through a lot of the parts. Is that your perspective?

Mr. Carrigan: Yes, I believe that we should have a strong, central government because, in fact, in the future we will be confronted with many efforts at intervention by foreign nations. You are going to have, within 25 or 30 years' time, China as strong as the United States industrially. Already, Japan produces more than the US industrially in every major category, although it has half the population.

It means, in effect, that the capital production of Japan is twice as great. That is now reflected in their strategic, ??in their military force, one thing and another, or in the future, it may very well be.

I can see China becoming as strong as the United States. I can see India becoming as strong as the United States. If this is the case, these governments will be tempted to intervene in Canada because we occupy a huge area and have a strategic location. I think that, in order to avoid a counterbalancing influence to this ?? outside intervention, which I think will inevitably come, we need a strong central government dedicated to preserving the national interests of Canada. Any effort to reduce the powers of the

Mr. Carrigan

C-1635-2

59

March 30, 1988

national government is offensive, dangerous and irresponsible.

Mr. Allen: I would presume, from your overall perspective, that you would tell us that this matter did not--the problem with your favourite constitutional construction has not just simply arrived with Meech Lake, that it probably has its chief initiation in 1980-1982, with the new Constitution and the charter.


Mr. Carrigan: Oh, yes, that is right. One thing, too, should be emphasized and that is that the Canadian Constitution stresses a much stronger national government than the US Constitution, because the Canadian government received its authority directly from the British government. It was not handed to it by provinces. In effect, it gave the provinces that authority. Two thirds of the area of both Quebec and Ontario consist of land given to the provinces by the national government from land which it bought, in effect, from the Hudson's Bay Company.

In fact, Ontario and Quebec only came into being into 1867, the same time as the Canadian government came into being. Therefore, I see the national government as prior to and stronger than the provincial governments and I do not think its authority would be weakened. I think that the ideals of a strong national government and a strong provincial government are compatible. This way, if I want some social reform, I can go to both levels of government. If I get rejected at one level of government, I can go to the other one.

By transferring large chunks of authority to provincial governments, in effect, we rule out the federal government as a source for progressive social and economic change.

Mr. Allen: Given that under Meech Lake the Senate, for example, would still function under the present terms of reference and given that the provinces only have ...

C-1640-1 follows





~~Mr. Meech Lake the Senate, for example, would still function under the present~~  
~~terms of reference, given that the provinces only have~~ power of nomination,  
given that the Supreme Court of Canada justices will not be appointed by the  
federal government unless they are acceptable, given that Meech Lake  
entrenches spending power which was not entrenched previously, and given that  
the immigration clauses give the federal government a kind of primacy with  
regard to overall standards and objectives in immigration, is there not rather  
more preserved of the federal parliamentary initiative in Meech Lake than I  
think I hear being acknowledged in your paper?

1640

Mr. Carrigan: No. The provincial governments would have the power to  
in effect determine who would be members of the Senate. The Senate does have  
the right to veto legislation and has ??not exercised that right.

Mr. Allen: Under penalty of the withdrawal of the ??suspense of veto  
by the House of Commons or some other more drastic action.

Mr. Carrigan: Yes, but this would disappear under Meech Lake so that  
they would be able to exercise a right of veto over legislation passed by the  
Senate and they would be under pressure to exercise that right from the people  
who are decisive in determining that, and they had become senators. The  
provincial governments would only put on any list such people as are friendly  
to them and are friendly to the ideals and objectives. These people would in  
fact be more concerned with provincial rights and needs and ambitions than  
they would be of the national interests.

I would see the right of veto power of the Senate would simply revive  
automatically, spontaneously, under these conditions and that you would have  
Senate veto in legislation. They have done it before. In the 1920s the Senate  
vetoed the first pension legislation passed by the House of Commons ??under  
Mackenzie King. They did that earlier. This kind of veto would revive under  
the Meech Lake proposals.

Mr. Allen: Finally, is it not true that over time new conditions and  
new circumstances that the nation finds itself in have a way of asserting  
themselves over the written Constitution itself? I am thinking of the ways in  
which in Canada peace, order and good government have been differently  
interpreted and differently used.

I am thinking of the way in which when federal power appeared to be  
necessary for the continued expansion of the American economy, for example,  
and the primacy of federal power, interstate commerce clause was used as a way  
of doing that in a way which it had not been exploited for that purpose  
previously. Within certain margins of the way in which one frames a  
constitution, there clearly is quite a bit of latitude that is left to change  
in time and circumstance and other generations to utilize the document. I am  
wondering if, in light of that circumstance, you do not think that Meech Lake  
stays within a proper frame of latitude which might allow us to move one way  
or another given the disposition of given provincial governments or given  
federal governments but which, none the less, keeps us more or less on track  
with regard to the potential that we have.

Mr. Carrigan: I would look upon Meech Lake as a major departure from

Mr. Carrigan

C-1640-2


61  
March 30, 1988

what is necessary for the Canadian nation. I think I need ?? ??proof more to say. The federal government for a long time had the right to disallow legislation. As late as the 1930s it was disallowing legislation by the ??Alberta government. This right is not exercised.

This ?? can be accommodated without the major changes and indeed the ??wholesale changes envisaged by Meech Lake. The whole thrust of the Meech Lake proposal is to in fact weaken the federal government in favour of the provincial governments, which I do not think at this particular juncture in history is required. I think we must look at in effect framing a constitution for the next 50 years. I do not think ?? people who are participating in this process in terms of decision-makers would reflect the wishes of the Canadian people when they in fact weaken the federal government for the sake of provincial governments.

The provincial governments are strong, and it is right that they should be. If somebody were to suggest that we weaken the provincial government for the sake of a federal government, I would be opposed to it. I want two strong governments at the provincial level and at the federal level. I see this moving in one direction only: weakening the federal government. I think we are in real dangers. What happens with the Senate? What happens...

C-1645 follows.



~~would weaken the provincial governments for the sake of the federal government. I would be opposed to it. I want two strong governments, at the provincial level and the federal level. I see this moving in one direction only, weakening the federal government, and I think we are in very real danger~~

What happens with the Senate? What happens when the provincial governments in effect have a major hand in selecting senators? I can see that leading to the continuous vetoing by the Senate of legislation passed in the House of Commons. It has happened in the past ?? kind of thing. Of course, the Meech Lake proposals virtually cannot be modified because of this unanimity clause and that means that the Senate would be more disposed to veto legislation. I see that as dangerous. It is quite right that they should modify legislation, which they in effect have been doing for the last 10 years, but I would be very much opposed to a proposal that would make it possible for them and make it likely for them to veto legislation wholesale, without any danger of this being changed under the Meech Lake proposal for change and its stress upon unanimity.

So I think yes, we must evolve and we have been evolving and will continue to evolve whatever happens, but we are not just talking about evolution, this is revolution not evolution.

Mr. Harris: I also have one supplementary on the Senate. How many senators does it take to veto a piece of legislation in the House of Commons?

Mr. Carrigan: It has not happened since 1960. I would assume just a bare majority. I am not certain.

Mr. Harris: So it would take a combination of at least 50 per cent of the population of all the provinces whose senators are represented there to all agree that they are going to veto a particular piece of legislation before one was ever vetoed.

Mr. Carrigan: I do not know how that relates to-- The senators would be appointed for life, as I understand it.

Mr. Harris: But you are saying they would owe their loyalty to the province that appointed them.

Mr. Carrigan: Yes.

Mr. Harris: So to get to a veto, given they are there until age 75, we are probably 60 or 70 years from now and finally all the senators in the chamber have been appointed or at least have come through this process. So now for them to exercise this veto, which they traditionally have not done in recent years--but you say it could come back--it would take a majority of the senators. Now, a majority of them will not come from any one province, so it would take presumably at least 50 per cent of the population of Canada, of senators who all have a provincial concern, to veto the legislation.

Mr. Carrigan: I think the people to some extent in Canada at the electoral level are divided. In the 1970s, the people of Quebec voted both for René Lévesque and Pierre Elliott Trudeau. I think they function on several levels. On one level, they want a strong central government and on another level they want a strong provincial government.



Mr. Harris: You accept what I have said, but it would still offend you that 50 per cent of the population of Canada could get together somehow on an issue via their Senate appointments and block a piece of federal legislation.

Mr. Carrigan: I would challenge your appraisal that it would be 50 per cent of the people. These people would be appointed in effect to a great extent by the provincial premiers. They are not directly elected by the people as the Senate in the US is.

Mr. Harris: No, but if I accept everything you say, then all the senators appointed by the Premier of Prince Edward Island, which is two, that Premier has to totally control them and say: "Look, I have made a deal with the Premier of Ontario and the Premier of Quebec" or "I have made a deal not with Ontario but everybody else to get up to 50 per cent. Here is the deal. You all go in there and vote this way because we do not like it." Is that not what has to happen?

Mr. Carrigan: The point is the provincial premiers would tend to nominate as senators people who agree with their philosophy.

Mr. Harris: But I have said that. I accept that. I think it would be passing strange if that happens, but I have accepted that. They all now are doing nothing but what the premiers tell them. Even though they were appointed by some premier 30 years ago and this new one is in power, they are going to do that. Does it still not take 50 per cent of the population?

Mr. Carrigan: I cannot see how the population would necessarily be involved. They would in fact be in office until retirement.

Mr. Harris: Can you answer me one other question? Why would any government of Canada appoint one of these people if they were convinced that they were there to respond to the provincial premiers? They do not have the right to appoint senators.

Mr. Carrigan: They have the right to submit a list and on that list would be people who--


Mr. Harris: Of course, but if I thought they were going to have a provincial concern, why would I, as the Prime Minister of Canada or the federal government, appoint them?

Mr. Carrigan: Because in the end you would have no choice. They would just keep submitting lists again and again. In the end, the Prime Minister would be under pressure to appoint one of the names on that list.

Mr. Harris: Why?

~~Mr. Carrigan: Because~~

C-1650 follows



1650

~~Mr. Harris: That is fine.~~

~~Mr. Carrigan: But in the end the Prime Minister would be under pressure to appoint one of the names on the list.~~

~~Mr. Harris: Why?~~

Mr. Carrigan: Because there is no reason to doubt that because potentially that will be their only realistic course of action.

Mr. Harris: Can I ask you one other question? In your Trudeau Returns to the Fray, Newsday, Wednesday, July 8, "...Mulroney's Progressive Conservative Party has long stood for provincial rights and foreign imperialism towards Canada, originally British imperialism, and now, increasingly, the American imperial vision, which would keep Canada subordinate to the United States in foreign, economic and military policy." Do you believe that it is Brian Mulroney's goal and that his party has long stood for a policy that would keep Canada subordinate to the United States in foreign, economic and military policy?

Mr. Carrigan: The Conservative Party, historically from the 1890s on, was a policy of British imperialism, which is one of the reasons the Liberals won the election time after time and they stood for backing the British imperial ?? vision, I guess. That of course has evaporated since Britain is no longer a major power. I think that in fact the thrust of the Mulroney policies...he says that you must have the benefit of the doubt, that the relationship is more than an economic one and would emphasize Canada's subordination to the United States. That is my interpretation.

Mr. Harris: You interpret his desire...because you talk about the free trade agreement, it is not to provide trade opportunities for Canada. It is to try to get us into a position where the United States can dominate us in foreign, economic and military policies. That is Mulroney's vision of Canada?

Mr. Carrigan: I think it is.

Mr. Harris: Thanks.

Mr. Chairman: Thank you very much, Mr. Carrigan, for joining us this afternoon and for making your presentation. As has been noted, you have touched on a number of issues, and as we are still struggling with answers, we appreciate the time and effort that you have put into your paper. Thank you very much.

If I might call upon our last witness for the day, Gerry Meinzer, the president of the German-Canadian Congress. If you would be good enough to come forward. I want to thank you for being able to rearrange your schedule and come at the end of the day. I should also note that it is always fitting to end the day with someone who comes from such a glorious part of Ontario, which is to say King township, which just happens to be located in my riding.

Mr. Allen: At least somebody ??.

Mr. Chairman: That of course bears no relationship whatsoever to the

Mr. Chairman

C-1650-2

65

March 30, 1988

presentation you are going to make, but I feel you have been very good and patient. We do want to welcome you here and to make the presentation on behalf of the German-Canadian Congress. We do have a copy of the submission. I believe that has been circulated to the members. Perhaps I will just let you proceed and we will follow up with questions.

Mr. Meinzer: I hope it is last but not least. There are such evils as still having to run a company and these things kind of get rescheduled. It means a lot of rescheduling and it turned out to be quite nice the way it did fit in the end. I am pleased that we could still do it today.

Mr. Chairman: Thank you very much.

GERMAN-CANADIAN CONGRESS

Mr. Meinzer: I represent as its national president the German-Canadian Congress. As you know, German-Canadians are the largest so-called ethnic group in this country. I want to focus my remarks on one particular aspect of the Meech Lake accord, which is multiculturalism because it does not only touch the federal side of the world but also the provincial side of the world

I need to tell you at the outset an interesting phenomenon that has happened recently and why I want to put so much focus and emphasis and perhaps even a bit of emotion into my presentation on multiculturalism. It took a long time because of events of the past, events of history, for German-Canadians to be true participants in multiculturalism in this country. If it goes away tomorrow, perhaps nobody in our community would really all that much care, but, interestingly enough, in the last census the official census said there were 1.7 million people of German origin in this country. It is a known fact that immigration out of German-speaking countries is virtually nonexistent. Yet, the new census where I have just received preliminary results says there are now--

C-1655 follows



(Mr. Meinzer)

~~origin in this country, and it is an old fact that immigration out of German-speaking countries is virtually nonexistent. Yet the new census, of which I have just received preliminary results, says there are now 2.5 million German-Canadians in this country.~~

I mention this at the outset because it is interesting because finally people of German origin are confessing they are of German origin, and it is no longer something you need to hide and you can hold your head up with a great degree of pride. If one talks about distinct societies and founding nations, German Canadians have been in this country as long as anybody else. They are indeed a founding nation. In fact, there are documents, loads of documents, to support this fact.

Mr. Harris: Or you have been reproducing much faster.

Mr. Meinzer: Actually, this is a problem. One could say, certainly in West Germany, that at their current rate of reproduction, there are going to be more Turks living in West Germany than West Germans. That is their problem.

The problem I wish to address today is the entire issue of multiculturalism, and I speak not only from experience as a leader of the largest ethnic group in this country but also as the immediate past chairman of the Canadian Multiculturalism Council, who fought very hard to get section 27 into our Constitution. I feel rather strongly that as part of the Meech Lake accord, section 27 will become less meaningful all the time. In fact, it might become totally meaningless.

I do feel that if one does believe in multiculturalism as a sharing of cultures in an equal sense, then it is totally hostile to say there is one society in our country that is distinct. Distinctness in the legal interpretation can mean that many things that the province of Quebec will undertake, such as educational aspects--I cite one example in my submission: They could say, "It is important to us as a distinct society that your German-language Saturday morning classes are going to be cut out." They would use that "distinct society" provision in the Meech Lake accord to have the power to do so.

My case to be made today is that if one truly believes in Canada being a multicultural country, by whatever description you define multiculturalism, one needs to accept that there cannot be a multicultural country--one says under the definition of multiculturalism when it was first introduced, as a result of the bicultural and bilingualism commission, as it was originally called, and later on, multicultural entered the picture--where all cultures are equal and one still says, "Yes, but there is one society that is distinct."

I do feel there would be no harm to include in the same statement that talks about Quebec, if one must talk about Quebec as a distinct society, multiculturalism as an equal position, not as an afterthought in section 16, not as a sort of loose proviso in section 27, but right in that first paragraph where a simple amendment stating that multiculturalism is part of Canada's fabric, that it is as much a distinct society as Quebec, where Quebec and Meech Lake are not harmed on one side and multiculturalism on the other side does not run any risk at all of being treated as a second-class

Mr. Meinzer

C-1655-2

67

March 30, 1983

participant in our society.

I feel that the different ethnic communities may have come at this from different perspectives but ours is quite clear, and ours is not an ethnic issue. Ours is a true multicultural issue. There is quite a distinction. It might be subtle but there is a distinction. When I speak as a leader of an ethnic group, I really do speak as simply a Canadian who comes out of one of these pieces that makes up Canada and its ethnic fabric.

I feel that on behalf of my congress, with its own multiculturalism within it--there are Mennonites, Hutterites, Danube-Swabians and people who have never in their lives seen Germany or who do not even know what it looks like perhaps. We have finally put this group together under one umbrella, and now only to be somewhat undermined by the provisions of Meech Lake that says, "There is a distinct society and multiculturalism is somewhere down there"

C1700 follows



(Mr. Meinzer)

~~...umbrella. Now, only to be somewhat undermined by the provision of the Meech Lake Accord that says, "Well, there is a distinct society, and multiculturalism is somewhere down there."~~ It is true that in this country all western provinces, German origin Canadians, are in second position, not French. I think one needs to recognize that ethnic communities--not just ones of our size--have the right under multiculturalism to be treated as equal partners. Or, as an alternative, I think the policy should be abandoned. The position--and I feel rather strongly--that one cannot keep paying lipservice on the one side that cultures are equal and on the side very strongly entrench in the constitutional amendment that says, "Yes, but there is one distinct society."

1700

Mr. Chairman, I know we have been running way, way late and I would much sooner answer questions that you may have, but at this point, it summarizes where we are coming from and all the detail that leads me to this summarization and to my statements is provided in the handout that you have before you.

Mr. Chairman: Thank you very much, in particular for zeroing in on that one issue and while it has come up at different times, I think that you have raised it with particular force and with a particular focus. We will turn right to the questions of Mr. Cordiano.

Mr. Cordiano: I certainly have done my fair share of talking on this question as far as our hearings go and certainly many of the other members of this committee have debated and discussed this issue and asked many of deponents that came before us their views on the whole matter. One of the things that I would like to get your response on and certainly share with you a view that I hold. It is the fact that when I look back at the Charter of Rights and Freedoms and you pointed out yourself and some of the people have pointed it out as well, there is a shortcoming with respect to multiculturalism and that section 27 really is an interpretive clause in the charter and as it was fashioned as an interpretive clause, it does not give any additional strength to the whole view or notion of multiculturalism. That, in fact, perhaps that is the best that could have been accomplished at that time, given the constraints that people were working under, trying to draft the 1982 Constitution.

Having said that I think that the Meech Lake Accord would section 16 not really take anything away from section 27 of the charter, does it? It is my opinion that it certainly does not give anything additional in it but it does not take anything away. It is just a reaffirmation of what was there. I think what we have to do is--and as a committee, certainly, we are going to be looking at this--look at the whole question of multiculturalism and that in fact when you look at section 2, the whole distinct society section, what we are talking about is this is a fundamental characteristic of Canada, that is that Quebec constitutes a distinct society. It is only one of the fundamental characteristics of Canada. That is what that section implies. Would you agree with me on that, or do you feel that there is some other meaning or interpretation?


Mr. Meinzer: I agree with your ??precision. First of all, in section



16 vis-a-vis section 27, but in the old Constitution accord there was not a discussion at all about a distinct society either. We are now introducing something new that distinguishes one part of society in this country against another where we have always declared ourselves as equal, culturally and being multicultural. Therefore one needs to put a position into a new constitutional document that says there is a distinct society, I think that would be an opportunity and I think a necessity to at the same time enshrine multiculturalism as part of the fundamental characteristics of Canada.

Mr. Cordiano: OK. Having said that--and I agree with you, certainly in the tone of what you are saying and the direction in which you are heading. I think it is also fair to say that Quebec was not a signatory to the 1982 Constitution and that there was not a full recognition of Quebec within the Constitution. ~~The Constitution certainly was not.~~

C-1705 follows



(Mr. Cordiano)

... Quebec was not a signatory to the 1982 Constitution, and there was not the full recognition of Quebec in the Constitution. In May, for all intents and purposes Quebec was certainly a part of the intent of the Constitution, but did not give its blessing, if you will. Obviously, they refused to participate and did not sign the Constitution Act 1982. I think this is an attempt to ask Quebecers what in fact they wanted with respect to the Constitution, what they wanted to see as part of the Constitution to get their support for inclusion in the Constitution in the Meech Lake accord. That is the result of what we see here.

Notwithstanding that view, I think we are looking forward to seeing what we can do in the future, not only on this committee, but as Canadians furthering the constitutional evolution, furthering the goals that might be accomplished down the road. This is the first round, it has been suggested. Certainly, with the provision in the Meech Lake accord for annual constitutional meetings there are going to be further discussions. One of the things that I would like to see furthered, is the whole question of multiculturalism, and that it too be recognized as a fundamental characteristic of Canada. I think other people have put that view forward.

Do you think that we can move forward with that. You think there is enough of an understanding within our country to bring that view forward, and just what that would mean?

Mr. Meinzer: It is my conviction that if it does not happen at this point, it is not likely to happen. Quebec's position, while they use multiculturalism quite nicely in the B and B commission to enshrine bilingualism officially, to move forward bilingualism at the time, and did accept multiculturalism instead of biculturalism in order to get bilingualism. They have never felt a true participant in multiculturalism in this country.

Quite interestingly too, Quebec still to this day treats the other groups as the ethnics. Most other provinces have looked at multiculturalism as it is in Ontario, certainly under this government, it has come a long way, but Quebec has never gone that direction. My position is, as far as we are concerned, this is the time to put it in. It does not harm Quebec and it is probably the only time we will get it in.

Mr. Cordiano: I do not see it that way.

Mr. Meinzer: Live in Quebec for a while.

Mr. Cordiano: Only because I think there is provision in the Meech Lake accord for annual constitutional meetings. I think if the will exists to make a change in the Constitution, then certainly a change is possible. Quite frankly, we saw that with Meech Lake. It may come to pass and it may not. The jury is out on that. All 10 provinces have to approve the constitutional package, and who knows if that is going to happen in the end. I would like to see that we would get Quebec back into the fold, and that is a very desirable objective. However, it is certainly not impossible in the future, it will not be impossible to have something like multiculturalism brought in as part of that package, as part of another package, or indeed, alone.

Mr. Meinzer: I do believe that the objective of this exercise, the Meech Lake accord, is to enhance our national position where all provinces are signatory to a document that we call our Constitution. In the same vein, I

Mr. Meinzer

C-1705-2


71

March 30, 1988

think multiculturalism in this country, if one that is true to its interpretation, is so important in this Constitution and as part of our national fabric, that if we are talking about bringing everybody into the fold, and this is our document to bring everybody into the fold, because Quebec has not signed, this is the time to do it. Whether the will exists two years from now, a year from now, who knows? I would much sooner see it as part of this bargain included, and down the line isolated, and do not ever get it.

Mr. Allen: I appreciate Mr. Meinzer coming before us and laying that one item on our agenda for the balance of the afternoon, because I think it is one of the central issues that does have to be debated and discussed in the context of the Meech Lake accord.

1710-1 follows





(Mr. Allen)

~~...that one item on our agenda for the balance of the afternoon, because I think it is one of the central issues that does have to be debated and discussed in the context of the Meech Lake accord.~~

1710

At the same time, what concerns me in the discussion is, first, with respect to Quebec and the bilingual and bicultural phenomenon, we have been looking at in this country for a long time trying to find ways and means of relating the two poles of the dualism to each other, the English-speaking communities on the one hand, made up of many different people, different backgrounds, and the French-speaking communities on the other which, I must say, increasingly is made up of people of many different French backgrounds. So, paranthetically, there is a kind of multiculturalism in both poles that is fairly significant.

In addressing that, we have been doing it under a Constitution which is recognized, given governmental structures and relationships. We are talking about provinces principally, although we also talk about aboriginal groups in terms of treaty rights, and so on. These are all formal entitles that have powers within the Constitution, and some kind of special arrangement between each other that are laid out in the Constitution. They have specific powers.

One of those provinces happens to be Quebec, where certain provincial powers are given but, at the same time, it happens to be the home of the majority of the French-Canadian people in the country. That tends to colour everything else.

That is the nature of the Constitution.

What concerns me about the multicultural part of the equation is that there is no province which is the residence principally of German people speaking German, or principally Belgians speaking Belgian, or principally Chinese speaking Chinese. Do you see what I mean? So you do not have this connection between the provincial powers, as given under the British North America Act on the one hand, and a cultural configuration with language attachment which creates the unique character of the situation in Quebec.

I am not sure how you go about what it means to entrench the multicultural fact in Canada. Does it mean that every province in the country is obligated to have immersion schools in every functioning linguistic community that may be able to make a claim in the province? What does it mean? We have not wrestled with those things.

That is the one point in which I am nervous about entrenching any more than multicultural heritage rights, already acknowledged as those we should enhance, but going beyond that does make me nervous in that respect. I do not think there is a national line that is even near to being consolidated around those questions.

I say that as someone who took a very prominent part in the heritage languages debate. I am a partisan of having heritage languages immersion schools in Ontario, and full day programs in the regular school system. I would like to see those things happen, but I really do not think there is a

Mr. Allen

C-1710-2

73


March 30, 1988

national consensus, even close to being formulated around those questions, let alone others pertaining to the multicultural community.

How do you respond to that? I do have a problem. If I cannot see our people getting their heads around just what it means in so many terms, I agree with Mr. Cordiano that what we need to have is a round of debate and discussion of a constitutional nature focused on the multicultural question itself, just as we have done with respect to Quebec. I would not be totally pessimistic about that happening. I think it is one of those unfinished agendas, and we will have to get to it.

Mr. Meinzer: I guess one needs to be very cautious to segregate the linguistic aspect and the cultural aspect. I do not think anybody under the guise or heading of multiculturalism--

(Tape C-1715 follows)



(Mr. Meinzer)

~~I do not think anybody under the guise or heading of multiculturalism~~ suggests that there should be linguistic equality of all these different heritage languages. It is a fundamental fact of this country that we are bilingual. I for one, personally on behalf of my Congress, is setting out to change this. What I am setting out to suggest is that we have also stated a policy that says, we cannot call ourselves bilingual, because almost 40 per cent of Canada's population comes from cultures other than English and French.

One talks about multiculturalism. It means everybody. It means natives. It means you and you. It means everybody around here. That is multiculturalism. The best compared to ethnics that says there is English, French and there are ethnics. It is quite different. If we do not recognize in our Constitution that all aspects, all cultural heritages are equal, then I do not know where we will recognize it, just as a statement that it is a fundamental characteristic. I do not think that statement might suggest a solution to it will for one moment suggest that you must then also offer heritage languages as part of your daytime program or any of that. It just recognizes that culturally, yes there are many cultures in this country that are to be treated equally, although we recognize that you can only teach them either in English or in French or even in their own language, but officially, we speak two languages.

I know that there is a fine line, but one must keep that fine line in mind. When one speaks of multiculturalism, it means everybody and by definition if you are talking about dominant cultures of English and French, whenever you talk multiculturalism, including these two, English and French, where a multiculturalism pie gets bigger, somebody else's gets smaller, the slice there gets smaller, so it needs to be recognized that there is an exercise of sharing in there, not go the other way around where it says, yes there is one group that is distinct and because of their distinctiveness they can take certain rights.

Mr. Cordiano: Can I have a supplementary on that? It is a very brief one.

Mr. Allen: Go ahead.

Mr. Cordiano: I just want to say that I agree fully with what you are saying. I think what Mr. Allen was trying to say, not trying to put words into his mouth, but I will say it from my perspective. There is a notion out there by some people that in order to maintain or preserve culture, language is the first and most necessary component of that culture. What that translates into as a structure for maintaining that culture is another matter. For example, we have had this debate on heritage languages, should it be a language of instruction. Some would argue, yes, it should be a language of instruction, which brings it almost into the realm of an every day usage for that language in order to maintain the culture. As an end to try to justify the maintenance of that culture you try to use language as a tool.

There are some who will argue that very vigorously. I think that is what we are talking about here. We are trying to say to ourselves, what is it that we want to do as a goal, as an objective in terms of multiculturalism? I would agree with you. We do have two official languages and those must be put above all other languages no question about it. But, when it comes into question with respect to education and using language as a tool for the preservation of a cultural identity, then we get into a whole fuzzy area that is not clear. I



Mr. Cordiano

C-1715-2

75

March 30, 1988

think that is what Mr. Allen--I am not sure--but I think that is the view that some people hold.

Mr. Allen: I was going to go on and ask much the same kind of question. I find it very difficult not to keep language and culture very much mixed up with each other. Otherwise the point that you make about Quebec under the guise of a distinct society council and German language classes on Saturday morning in Montreal, does not mean anything. You might as well learn French and remember your German heritage in French. That is a contradiction for me. You need to have something going there and at the language level it is reasonable, has some secure basis. I think that we should---

C-1720-1 follows



~~You might as well learn French and remember your German heritage in French. That is a contradiction for me. You need to have something going there at the language level that has some secure bases. I think we should be a mature enough country to realize, given the kind of global world we live in, that is a reasonable project to undertake.~~

1720

I do not see that we have got our heads around just how all that comes together nationally, to get it in those terms into the Constitution, but I am terribly sympathetic to having another round that goes at that question very forcibly and gets us thinking on those lines much more directly than we have.

Mr. Chairman: Before Mr. Meinzer answers that, I know Mr. Harris had a supplementary on the same point. This is a multifaceted question requiring a multicultural answer.

Mr. Meinzer: I will answer it unilingually.

Mr. Harris: ?? anywhere near possible. I think what you are saying is that you would accept under "distinct society" the supremacy of the French and English languages as it dealt with language. It is a bilingual country, French and English, and any interpretation of "distinct society" to deal with language--it is bilingual, it is French and English. That is number one.

But when you talk about culture, it is multicultural. In any dealings that have to do with culture, you want all cultures to have equality.

Mr. Meinzer: That is correct.

Mr. Harris: I think that is what I hear you saying.

Mr. Meinzer: That is exactly what I am saying.

Mr. Harris: I do not know whether it is possible to do it.

Mr. Allen: What does it mean?

Mr. Harris: It means the French culture in Quebec is not ahead of the German culture in Quebec, the French language is.

Mr. Meinzer: Our current leader of the federal Conservative Party and Prime Minister, in his election pitch in 1984, stated that multiculturalism is part of what it means to be Canadian. As a Quebecker, he states it very fundamentally in one sentence.

I think the recognition has got to be given that if one believes, as section 27 suggests--and it is an interpretive clause--that Canada is multicultural, then I think one needs to also agree that in order for Canada to be multicultural, it has to be a fundamental part of Canadian citizenship. As distinct as our two languages and as distinct as Quebec is in their linguistic priority, it needs to be recognized in equal terms.

As to what "distinct society" means at this point, there will be interpretations galore and there will likely be lots of rounds where one

Mr. Meinzer

C-1720-2

77

March 30, 1988

defines multiculturalism more specifically. As undefined or as defined as "distinct society" today may be, all I am asking is that multiculturalism goes into the same level, or alternatively, perhaps one should get off that policy altogether.


t is not good enough to say that multiculturalism is equal to being Canadian and then relegate it to section 27. It just does not work. It is fundamentally hostile to the position that anybody preaches, "Yes, we are a multicultural country," and at the same time saying, "Yes, but our Constitution says there is a society that is distinct." The two do not work.

Mr. Allen: I would argue otherwise. It is possible to have a distinct society and a multicultural community at the same time.

Mr. Meinzer: I was on that council for four years, two years as vice-chairman and two years as its national chairman. I have wrestled with this problem extensively. It was always a major issue to get Quebec francophones to participate. It was never an issue in Ontario, it was never an issue in New Brunswick, it was never an issue anywhere else, but it is an issue in Quebec, because the Quebec government pushes in a different direction.

Mr. Allen: But at the same time, even though I acknowledge that, I think the . . .

C-1725 follows





~~was never an issue in New Brunswick. It was never an issue anywhere else, but~~  
~~it was an issue in Quebec because the Quebec government pushes in a different~~  
~~direction.~~

Mr. Allen: Yes, but at the same time, even though I acknowledge that the fact of the distinct society and the French language has also meant a lot for the development of multilingualism and multiculturalism in Canada. I would submit that in the context of Quebec society, one means not only majority French at the present and in the foreseeable future. One also means a certain history that had been attached to that province that is part of the memory of that province; also the existence of the civil law, the civil code, which of course anybody who goes there, whether they are Vietnamese, French or whether they are from Senegal, they have to live within the civil code as the recognized legal dimension of Quebec's life.

But that all being there, none the less they have the rights to maintain their own multicultural organizations, their voluntary societies, without any hindrance or discrimination. They may mount their own linguistic heritage programs, if they wish, and so on. I do not see that really counter to, although it may over time change certain elements of the ambience of Quebec society as indeed it has because Quebec, as a French-majority province, is not the same today as it was 50 years ago in a whole lot of ways but most of all in the multicultural dimension.

My sense is that it is possible to maintain equality of multicultural rights at the same time as maintaining the sense that there is a distinct society there and that there are two dominant languages in Canada.

Mr. Meinzer: I am not totally disagreeing. I am saying recognize it right here.

Mr. Allen: But what I am saying is that in terms of the Constitution, if one were to come back at you and play devil's advocate, one could say that there is nothing in the Constitution that derogates from a de facto equality of the multicultural communities in Canada because they all have an existence at a voluntary level. What I do not know is what it means for them to have an existence at a constitutional level. You see what I mean? You see, I do not understand that yet.

Mr. Meinzer: I guess my side of the debate is that you are now singling out a distinct society without putting on the same denominator the multiculturalism aspect and one can then use that because it is there by itself distinct society. One can then use that. It says, "Yes, but under this provision we do not really need to worry about multiculturalism." I am not disagreeing with you. I am saying let us just anchor it right here and right now while things are on the bargaining table. It is nothing for Quebec to give and it is everything for 40 per cent of this country's population to gain.

Nobody is disagreeing, but nobody wants to sit down and say, "Yes, let us say so." That is really all I am asking. I know when you look at the ethnic communities in Quebec, and I speak for my own, they did not leave in the Rene Levesque days. They learned French. Predominantly English-speaking people left. The Italians are all still up there. They learned French. It has helped to get an appreciation of another language.

Mr. Allen: Thank you very much.

Mr. Chairman: Just before Mr. Eves asks his questions, if I could just ask members. There is one very brief matter we need to deal with for 30 seconds after we are finished here. Thank you.

Mr. Eves: Mr. Chairman, my question has already been answered by the witness. I think he said it far better than I could say it. Basically, what you are asking is a statement about the multicultural nature of Canada in the Constitution. That is what you would like to see.

Mr. Meinzer: Absolutely. Plain and simple.

Mr. Eves: I do not think there is anything wrong with a little bit of emotion, as well as sincerity, added to a presentation. We thank you for your....

Mr. Chairman: Mr. Eves, as always, is short, sharp and succinct ??with the final question.

Mr. Meinzer: Not ??distinct.

Mr. Chairman: Yes.

Mr. Allen: Mr. Chairman, ??will that be the triple S?

Mr. Chairman: That is right. The triple S, yes.

Interjections.

Mr. Chairman: I think that this has been a particularly useful exchange for us. As Mr. Cordiano said earlier, we have talked about this issue, I guess particularly earlier in the sessions. I think it is interesting coming back to it after having heard a lot of other things--

C-1730 follows



(Mr. Chairman)

~~and I think it is interesting coming back to it after having been in Ottawa~~  
~~other things~~ about other topics in terms of how they are affected by Meech Lake. I really want to thank you for focusing so clearly and, as Mr. Eves says, for also speaking with feeling and with some passion. I think your experience, as you noted, previously with the multiculturalism council has certainly allowed you to see how this issue is approached in different parts of the province and the country in the different provinces and how we should proceed. We want to thank you very much for coming here today and helping us in this task that we have before.

1730

Mr. Meinzer: I appreciate the opportunity. Thank you, everybody.

Mr. Chairman: Thank you. A very brief question. I need a motion to enable the clerk to pay the chairman's expenses at the conference in Ottawa.

Mr. Allen: Sorry.

Mr. Harris: See you later.

Mr. Chairman: That is what I was afraid of. I wonder if there is anyone brave enough to so move.

Mr. Allen: So moved.

Mr. Chairman: Thank you, Mr. Allen.

Mr. Cordiano: What committee?

Mr. Chairman: It was the conference on the Charter of Rights, Canadian Parliamentary Association over the spring break. While others were relaxing, I was working on behalf of the committee. Thank you very much. We stand adjourned then until 9:30 tomorrow morning.

The committee adjourned at 5:31 p.m.



CA 22a

XC 2

- 8152

C-22a

(Printed as C-22)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, MARCH 31, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)  
VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)  
Allen, Richard (Hamilton West NDP)  
Breaugh, Michael J. (Oshawa NDP)  
Cordiano, Joseph (Lawrence L)  
Elliot, R. Walter (Halton North L)  
Eves, Ernie L. (Parry Sound PC)  
Fawcett, Joan M. (Northumberland L)  
Harris, Michael D. (Nipissing PC)  
Morin, Gilles E. (Carleton East L)  
Offer, Steven (Mississauga North L)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service  
Madisso, Merike, Research Officer, Legislative Research Service

Witnesses:

From the Business and Professional Women's Clubs of Ontario:

Neville, Liz, President

Morrey, Frances, Vice-President

Jackson, Margaret, Past President, Canadian Federation of Business and  
Professional Women's Clubs

McDonald, Kris, Member, Business and Professional Women's Clubs of North York

From the Ad Hoc Committee of Women on the Constitution (Ontario):

Kiperchuk, Daria

Nye, Linda

Jackman, Nancy

From the Ontario Advisory Council on Women's Issues:

Kerr, Sandra, Vice-President

Ramkhalawansingh, Ceta

Vianna, Bridget W., Executive Officer

Individual Presentation:

Milnes, Arthur H.

## LEGISLATIVE ASSEMBLY OF ONTARIO

## STANDING COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, March 31, 1988

The committee met at 9:53 a.m. in room 151.

1987 CONSTITUTIONAL REFORM  
(continued)

Mr. Chairman: Good morning ladies and gentlemen. If we could begin the morning session. One of the things we all find living outside of the confines of Metropolitan Toronto is it is always an adventure every morning getting here. This morning it was as interesting as some other mornings. So I apologize that we are beginning somewhat later than we had intended, but that will not affect the amount of time that we will be able to give to each presentation.

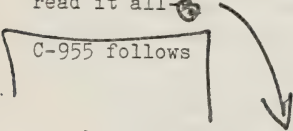
Our first witnesses this morning are the representatives from the Business and Professional Women's Clubs of Ontario; the Ontario President, Liz Neville, Fran Morrey, the vice-president, Margaret Jackson, the past president, and Kris McDonald, who is a member. We all have a copy of your submission. So if I pass the mike to you, please proceed with your presentation and then we will get into questions after that.

## THE BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF ONTARIO

Ms. Neville: Thank you very much, Mr. Chairman. I am Liz Neville, the president of the Business and Professional Women's Clubs of Ontario. On my far right is Fran Morrey, the vice-president, and on my immediate left is Margaret Jackson, who is actually a past president of our Canadian federation. Kris McDonald is on my immediate right.

Our brief, for us, is reasonably short and I am not going to attempt to read it all.

C-955 follows





(Ms. Neville)

~~President of our Canadian Federation and Kris McDonald is on my immediate~~  
~~right. Our brief, for us, is reasonably short and I am not going to attempt to~~  
~~read it all.~~ Although I hope that you will find the time to do so, because  
some of the perhaps anecdotal material that we have put in, I think is very  
pertinent to this issue but I will not go over it in its full detail this  
morning. I do want to emphasize that the BPW clubs of Ontario is a  
co-ordinating organization for about 40 clubs throughout the province and our  
membership is a very active group of women in business and in the  
professionals and in the technical and support level jobs in all sectors of  
employment. We are, of course, members of the Canadian Federation which has  
clubs throughout Canada and of the International Federation where we have  
category one status as a nongovernmental organization with the United Nations'  
agencies. This gives us the right to speak to some of those bodies and  
emphasizes the status of our group in the international world.

In Ontario, our clubs, in fact go back as far as 1910 and our objectives  
have always been to improve the status and promote the interests of women in  
business, professions and industry and particularly to promote full and active  
participation of all women in public life. We have presented many briefs to  
this government and to other levels of government and including on the issues  
concerning women's participation in and responsibilities for the  
administration of law and government. You will see from the length of our  
history that some of our members will vividly remember the "Persons Case" and  
in fact where lobbyist for a time sure in 1928, and the extraordinary measures  
that were needed for the British Privy Council to overturn the ruling by the  
Supreme Court of Canada that women were not persons in the British North  
America Act or Consitution Act of 1867.

Many of us remember that only 8 years ago we participated in the debate  
about the patriation of the Canadian Consitution and in the extremely  
important ad hoc conference of Canadian women on the Constitution, which  
caused significant changes to the 1982 Consitution which resulted in  
significant changes which appeared in the Canadian Constitution Act of 1982.  
We thought that at last, progress was certain and that never again would  
women's interests be overlooked in framing public policy.

Reality has indeed caught up with us and although we debated whether it  
was worth our while to appear at this committee in terms of the process of  
arriving at the Meech Lake Accord. We did decide that it was our duty to  
record the three serious concerns which we consider will in the short run as  
well as the long run, undermine the significant achievement and basic purpose  
of the Meech Lake Accord of making it possible for Quebec to be fully part of  
Canada. This purpose is too important for the unfortunate ambiguities and  
ommission of the Accord not to to remedied before it is entrenched in the  
Constitution.

In summary our concerns are the lack of the democratic process prior to  
committment by the premiers to the Meech Lake Accord. The famous group of 10  
meeting in the middle of the night. The risk of erosion to gender equality  
rights provided by section 28 of the Canadian Charter of Rights and Freedoms  
and the risk of erosion of equality rights under section 15 of the Charter.  
You are very familiar with why we have this concerns. It is basically because  
of the combined impact of clause 1 of the Accord and clause 16 Accord.

Ms. Neville.

C-955-2

3

March 31, 1988

I want to assure the committee that these first two concerns have been identified in consultation with our membership across Canada through president Gertrude Demecha of Kamloop, British Columbia who is our National Federation president and also I have personally discussed these issues with the president Germaine Bolduc of the Quebec BPW clubs, l'Association des Clubs de carrière des femmes du Quebec. ~~We emphasize that the Canadian Federation is fully in support of action...~~

(C-1000-1 follows)



Mr.  
(Ms. Neville)

C-1000-1

4

March 31, 1988

~~of the Quebec Business and Professional Women's Clubs, Association des clubs  
de carrières des femmes du Québec~~

1000

We emphasize that the Canadian federation is fully in support of section 2 of the Meech Lake accord and recognizes the importance to Canada's national unity of these provisions. I must admit that the Quebec president does not perhaps fully share the urgency of our concerns, but she fully supports our efforts to clarify and confirm that agenda equality rights will not be eroded in any way, anywhere in Canada by the entrenchment of the new section 2. Obviously we all wish this to be accomplished in a way which is acceptable to Quebec and which will preserve the essence of the accord which, I believe, were your words, Mr. Chairman.

The third issue that we are concerned about arises out of our experience of presenting briefs to both the federal and provincial governments which have relied on the development of an encouragement and maintenance of specifically defined national standards. I am referring to the ambiguity of the accord's provision with respect to federal shared-cost programs and particularly the term "national objectives" which will determine the payment of federal funds to provinces under future shared-cost programs.

I will comment first on our concerns about the lack of democratic process, which I summed up in my head in the course of preparing this brief, that good intentions are not a foundation for the unity of the nation.

The first two paragraphs on page 3 point out that we in fact have felt well-served for many years by the efforts that the Ontario government has made to involve us and to create an open participatory process in looking at issues and making legislative decisions. In May 1987, we were certainly assured in our minds, and really rather proud of Premier Peterson's role in facilitating the negotiations, as we understood it, and to ensure that Quebec could not accept the 1982 Constitution Act.

I must admit that time of the year, and especially last year when we were planning to go to The Hague to a conference of our international organization, we perhaps did not fully look into the accord in the first place, although we did note and were rather puzzled that in a hurry clause 16 was added to the accord. This certainly alerted us, but not sufficiently at the time, to the implication that somehow the accord would otherwise take precedence over these Charter of Rights and therefore possibly override others.

When we returned to Canada, it was very distressing that, through our Ottawa club, we were indeed alerted, alarmingly so, to all the excellent briefs that had been put together by some of the national women's organizations, including the Canadian Advisory Council on the Status of Women. We were dismayed at the way these brief were being treated by the federal committee.

Our Ottawa club in fact reported that the joint committee of the Senate and the House gave a cool reception on August 20 to the brief from the Canadian Advisory Council.

Our faith was still that with proper consideration and time, Ontario




could be persuaded to slow things down and give due consideration to reasonable opinion.

We came back, of course, also to an election campaign and we were reassured by Mr. Scott that there was no intention on the part of Premier Peterson and the Ontario government to endanger the equality rights of women or anyone else, and he promised public hearings, which certainly did come through and are happening.

Having read the Hansard record of the presentation of the motion, we were very aware of the Premier's apparent unwillingness to really undo the accord at this time and to--

C-1005 follows



~~... were very aware of the Premier's apparent unwillingness to really~~  
~~undo the accord at this time and to~~ indeed have any further slowing down of the process. I have quoted from Hansard some of the remarks that were made on that occasion.

In summary of our feelings about all of that process, we recommend that this select committee report back that it is not in the national interest to force the upholding of the accord by Ontario, without further consultation by the Premier of Ontario with all the first ministers to review all of the concerns which have debated since the accord was signed and became subject to this public debate.

Specifically on equality rights, turning to page 5, we do indeed consider that there is a serious and egregious risk of erosion to gender equality rights provided in section 28 of the Canadian Charter of Rights and Freedoms, and the risk of erosion of equality rights under section 15 of the charter if the Meech Lake accord is not amended. We have explained before the basis of our concern, the conflict between clause 16 and clause 1. We have read the legal arguments which have been presented to the joint committee and to this committee, and particularly refer you to the presentations of Professor Beverley Baines and Professor Mary Eberts.

In addition, we would like to bring to your attention our own reading of some of the explanations about these two sections. I particularly noted that Mr. Scott said to the motion in the House that clause 1, which is section 2, does not override the Charter of Rights; it is subordinate to the charter. In her paper on this point, in discussing whether anyone considered that section 2 overrides the charter, Professor Baines noted that Professor Hogg, whom I believe has advised this government on this matter, could have been said to have made that statement too, but he qualified it somewhere later on, and she said that he thought he might be better interpreted as meaning the charter--I think I have misquoted the statement.

Would you give me leave to check that statement because I do not think that is the point I am making? The fact was that Professor Hogg's opinion did qualify his remarks that the clause 1 would override the charter. In fact, our original purpose in quoting Mr. Scott was to contrast his statements with those from correspondence with a representative of the federal government, and I apologize that we have that sentence in two places in the brief.

Our Canadian president, Gertrude ??, received a letter from the honourable Barbara McDougall dated October 14. Ms. McDougall is the Minister responsible for the Status of Women in the federal government. In Ms. McDougall's reply, it was indicated that, in the course of the past four months of discussing the impact of the accord, it had become evident that the accumulation of the body of test cases before the courts will be extremely important to the understanding of the effect of the charter. However, she was able to come to the conclusion that she was convinced that the important rights established under the charter are not diminished by the accord, and quoted the joint Senate and House committee in saying that the accord builds on and does not undermine the achievement of the charter.

~~Ms. McDougall emphasized~~ ...

1010-1 follows

March 31, 1988

(Ms. Neville)

1010

Ms. McDougall emphasized that the duality and "distinct society" rule will not override the gender equality rights, or vice versa, and that they will be read together, along with other constitutional values, in any charter analysis by the court, or vice versa, and that they will be read together, along with other constitutional values in any charter analysis by the court in any cases under section 2. Our problem is, how can we be satisfied with leaving the uncertainty about which of these responses is the valid response, and how the courts will, in fact, interpret legitimate concerns in future. Therefore, we urge that the Meech Lake accord be amended so as to ensure that section 2 of the Constitution Act will not affect the equality rights of the Charter of Rights and Freedoms.

On our third point on the shared cost programs, we have mentioned our various presentations to the governments, particularly on education, training and, of course, child care. We have also presented on the need for a national workers health and safety standards. In all of these areas of provincial responsibility, our concern has been that there shall be comprehensive, national programs in support of these essential requirements, and that they be backed up by funding across Canada. We do not rule out provincial autonomy, but we are facing reality that provincial priorities across Canada, even in Ontario, do not always coincide with agree upon social needs, especially of women.

You are familiar with the provisions of clause 7 of the accord. The last part of it is that the province carries on a program or initiative that is compatible with the national objectives, then it will receive compensation from the federal government. There is tremendous uncertainty in several of the terms in this clause and we are particularly anxious that the word "objectives" is clarified by the word "standards." Standards are applied and have to be complied with before federal compensation is made to programs. We urge that the term "national objectives" with reference to federal cost shared programs be replaced or defined to ensure that compensation depends on compliance with national standards.

Thank you very much, Mr. Chairman.

Mr. Chairman: Thank you for a very clear presentation and specific recommendations. While there may have been a problem with a couple of lines, the point was clear. If you simply want to send us a revision of that paragraph, that is fine. I think we understand the point that you were trying to make. I wonder if I could begin the questioning by asking if you would expand on one point in your brief. As a provincial committee, and I think this is going to be a problem that all provincial legislative committees, now and in the future, dealing with constitutional change, or we are going to have to develop some meaningful process whereby a provincial committee which is dealing with a national issue, but which perhaps cannot travel, perhaps should not travel to all parts of the country. That may be more appropriately the role of the House of Commons and the Senate.

One of our difficulties has been, in terms of all of this discussion, trying to figure out what do many of the comparable groups and organizations in Quebec feel about some of these issues. You have mentioned in your brief



Mr. Chairman

C-1010-2

8

March 31, 1988

discussions with the national level of your association and also the Quebec wing. I wonder if, without presuming that you can speak, of course, for the Quebec body, but could you share with us how you evaluate their concerns or where there are nuances or shades of difference? I think it is very helpful to have the statement where you note that they support the efforts to clarify and confirm the general equality rights will not be eroded in any way anywhere in Canada. is it that think this can be done in a different way? What

1015-1 follows



sh  
(Ms. Neville)

C-1015-1

9

March 31, 1988

~~They support the efforts to clarify and confirm that gender equality rights~~  
~~would not be eroded in any way, anywhere in Canada. Is it that we think that~~  
~~this can be done in a different way? Are there any particular points there~~  
that you could share with us in terms of differences of approach?

Ms. Neville: It is rather difficult to answer the question because of the way that this came about with tremendous pressure from the Quebec government which in fact originated the proposals which were accepted with some changes I am sure, by the other Premiers. Then immediately the accord was reached, went back and discussed with some of the public, including some women's groups I believe, and immediately rushed this through their national assembly. At which point I think our clubs in Quebec even more so than perhaps in Ontario felt, great, that is done, Quebec will be in and federalism is extremely important to some of them, to all of them I would say.

They are fortunate in Quebec in having a very progressive state of affairs with regard to a status of women. In fact, they have often led the way. On the other hand, things are not perfect in Quebec. Certainly with respect to our own women's groups, Germaine Bolduc was quite clear that based on the brief that she had seen from the Canadian Advisory Council, that if there was this degree of concern about equality rights, she realized that one could not be sure and that it was in the best interests of indeed of all women in Canada, including themselves. Although they hoped against hope that it would not be detrimental to them, and that if it was it could perhaps be dealt with at a later stage, nevertheless they are very concerned that it might not be so.

Mr. Chairman: So that the bottom line remains that if there is doubt and there is a way of clarifying that doubt, then let us do it.

Ms. Neville: That is right.

Mr. Chairman: And there would be no difference of opinion in that.

Ms. Neville: Right.

Mr. Allen: Thank you very much. I appreciate the fact the business and professional women's clubs of Ontario have devoted such careful thought to the subject that they have got a very intense line of argument going in the brief that steps through in a very presentable kind of way. I appreciate your concerns. As the chairman has indicated, we have all been seized on the committee with the process problems around all this and we are determined to try to do something about that. I will let that go at that.

I certainly have no problem with asking the Premier (Mr. Peterson) to do one more round with the other premiers to check out whether there is not some consensus developing after a number of months among his colleagues around some of the issues that have been raised and debated at some length.

I wanted to make two points and ask you about two matters in your brief. First of all let me go to the simplest one. I will come back to the equality question. The question of spending power and shared cost programing has been a difficult one I think for a great many people to get their heads around. Obviously we have in this country an immense attachment, which certainly I share because my party had a good deal to do with the origins of some of those social programs, but we have a great attachment to the Canada assistance plan,

Mr. Allen

C-1015-2

10

March 31, 1988

the Canada Health Act and a whole range of programs that are out there that undergird the health and security of people in our country. We cannot under any circumstances compromise those. I take your concern very much to heart.

I think what has given undue concern about that issue is that there seems to be an impression that somehow the federal government has been relatively free in the past simply to propose programs, to move with national standards and to bring all the provinces along as though that were a matter very much taken for granted and to ignore the fact that one, many of those programs have begun initially in provincial jurisdictions and second have only over time been negotiated into national programs...

C-1020-1 follows



March 31, 1988

(Mr. Allen)

~~the matter very much taken for granted and to ignore the fact that many of those programs have begun initially in provincial jurisdictions and second only over time been negotiated into national programs through the agency of the federal government.~~

1020

I think what the accord tries to do in fact is to strengthen the federal hand rather than weaken it. I will put that proposition to you. It confirms for the first time that the federal government has got a right to spend money in areas of exclusive provincial jurisdiction. Without that, every movement of the federal government into that area, would be contestible in the courts. Now there is a beach head. There was not before. There was money there to attract people, but there was not constitutional authority really to use it in that domain.

I note that when you quote that section of the accord, you do perhaps by an oversight leave out that phrase in an area of exclusive provincial jurisdiction. Unless you have that in, the whole point is missed as to what the accord is all about. Would you respond to that please?

Ms. Neville: Yes, on that last point. It is a point which personally I am absolutely familiar with and therefore did not see any need to include it because obviously we would not be talking about this, at least I did not think we would be talking about this unless it was the question of the federal government operating in areas where the provinces have jurisdiction.

Mr. Allen: Exclusive jurisdiction.

Ms. Neville: Exclusive jurisdiction.

Mr. Allen: There are other shared areas where they have jurisdiction, but the federal government does too. They are in the same area together. This is different.

Ms. Neville: I do understand the point that you are making that this clause gives them leave to provide funds in those areas, I still think though, looking at the child care situation in particular, that it is very important that the national standards be set because otherwise the money could be going to provinces which are supporting very inadequate and very poor programs in fact. You may well say that something is better than nothing, but without going into any details, I could say that sometimes something is worse than nothing. I would not like to see our moneys moving in that direction and above all, where there is a cost sharing program, our main concern on a Canada wide basis is that the federal government should have the clout of that money to raise the standards across Canada.

Mr. Allen: I certainly agree with that. I would submit that the case that you have mentioned of child care is a case of a government that is not prepared to set national standards or even objectives that are meaningful in any real sense of the term. I think that even under the strongest language that you would want you are still not going to be able to use it to persuade a federal government that is reluctant to set standards or to set objectives. It is simply a boundary beyond which they cannot pass.

Ms. Neville: Perhaps it is more the case that we would not agree

with the standards that it would set. Maybe that would then be debatable in setting those standards. The word objectives is very loose and is not used for example with respect to the umbrageous clause, in clause 3 of the charter. It is standards and objectives that we are talking about there for sure, still in the Meech Lake accord.

Mr. Allen: Does it give you some assurance that the Canadian Council of Social Development which has declared its interest in moving into new fields of national share cost programs has written as follows in a brief to us. "We maintain that the concept of national objectives can be employed to ensure clarity of direction and purpose, as well as public accountability of governments, while not undermining program development, administrative flexibility or creativity?" They have given us four rather substantial paragraphs on the content of national objectives.

Ms. Neville: Mr. Allen, I think that the point is that I would agree with that, that it could be. I am in the human resources field myself and the word objectives can be very valuable to determining what a program shall be about and so on, but I think that our requirement that this be more explicit, that it is indeed more detailed, as the Canadian Council is I think expecting it to be, is actually defined--

C-1025-1 follows



(Ms. Neville)

~~... requirement that this be more explicit that is indeed more detailed as the Canadian Council is expecting it to be, is actually defined within the documents. This springs from a lack of trust which has been undermined in the process of establishing the Meech Lake accord itself.~~

Mr. Allen: Our concern in this whole exercise is what reasonable interpretations have been placed on language and on words. To me, the Canadian Council's assurances give me more security than I had before with regard to that language. That is the point I wanted to make.

Ms. Neville: I hope that you and they are right.

Mr. Allen: On the equality question, may I simply observe that it is always interesting to compare the statements of politicians involved in events. You can always find those nuances that you found in the very interesting series all the way from, "not diminished, does not undermine, will be read together, does not override subordinate to."

But when you take it all together I would submit to you that the reason for the confusion in the language is that there is no certainty in the charter itself. So when you ask for a charter override you are really asking for a document to override which, in itself, allows for a whole series of diversions, if you like, from the equality principles of section 15.

Even in section 15 there is the affirmative action section too. Then there is section 1, with regard to what is reasonable in a free and democratic society, the legislative action which may be used to balance off rationale assertion of right. There is section 33, the overall notwithstanding clause. They are the clauses that have to do with aboriginal rights, multicultural rights, that have to do with denominational schools' rights, the whole series in there which can lead in a number of directions and which are weighed in alongside the equality section. I would submit to you that the reason for diversity in the language is because the charter itself has a variety of options within it for balancing legislative and judicial concerns around the question of rights.

Is that a tall, persuasive argument for you?

Ms. Neville: No. We are aware, and I agree with Ms. McDougall's remarks that there is still a lot of jurisprudence to happen with respect to the charter.

Mr. Allen: Certainly.

Ms. Neville: But the equality provisions of the charter, and section 28 of the charter, the gender equality rights, I think are the absolute basic principles of statements of rights that, of course, we are anxious to see how the courts interpret these in the event. So far, we have been reasonably well pleased, especially with the Morgentaler, as it were, decision. To create further uncertainty by suggesting that those rights are not the principle still to be applied to the clauses of Meech Lake, particularly to clause 1, is a travestition of all the thought that went into shaping those equality rights and gender predominance rights of the gender and equality rights of the charter.



I would not like to see them called into question at all as being applicable to the Meech Lake accord in the same way as the premier's rather late in the day, in fact, not until after the first signing, thought it necessary to include sections 25 and 27. If that is necessary, then certainly section 28 is necessary, and preferably section 15 as well.

Mr. Allen: So maybe section 16 is a mistake.

Ms. Neville: That is ??--

Mr. Allen: You see, my only point is the argument is that Meech Lake somehow goes backwards. If you look at the charter itself the same arguments can be used about the charter as is used about Meech Lake. The problem is not in the Meech Lake accord.

I thank you very much. Those were very interesting remarks.

~~Miss Roberts: Thank you very much for coming today.~~

(Tape C-1030 follows)



(~~Miss Roberts~~)

~~...Meech Lake and the problem is not in the Meech Lake Accord~~

1030

~~Thank you very much. Those were very interesting remarks of yours~~

Miss Roberts: Thank you very much for coming today with your excellent presentation, and making very briefly three points that we have heard on many occasions and bringing your own particular slant to them, as well as your own expertise.

I want to continue on from what my colleague has been saying with respect to the rights that are in the charter itself. Your comments, your determination of the importance of putting into sections 16, 28 and 15, when you look at the Meech Lake accord, and when you were reviewing it, you were aware of the many different types of rights that there are in the charter. There are the legal rights, minority language rights. I think there are some school rights as well, education rights. There is the general section in which you have those areas that are dealt with under sections 25 and 27, things like that, multicultural rights, aboriginal rights.

To clarify in my mind your exact position on this, what is the best way to deal with this problem? I will give you three. Your answer can be four. Okay? Take out section 16 of the accord. Add to section 16 sections 15 and 28 of the charter. Put somewhere in the accord the charter prevails, the entire charter, or something like that. Which is the best way to deal with that? Which will achieve what you consider to be your recommendation number 2? I will leave it at that right now.

I appreciate that you have asked us to be specific. I would say that the bottom line is to ensure that section 28 prevails over what?

Ms. Neville: Within Meech Lake.

Miss Roberts: Over what?

Ms. Neville: Over section 28, the gender equality rights overrides section 2.

Miss Roberts: So that is your bottom line? You think that is the most important thing?

Ms. Neville: That is the bottom line. If it could be achieved by taking section 16 out then that would be fine, or if it could be achieved by section 28 being included in clause 16 that is another approach. Preferably, we would like to see both sections 15 of the charter and 28 of the charter with the basic rights and freedoms and the gender equality rights clearly override, if you like, the section 2 of the Constitution.

Miss Roberts: And you are not concerned about any other rights in the charter that would not be mentioned.

Ms. Neville: The basic individual and group rights in the general rights of section 15 are very important. Speaking as a women's organization,

section 28 is as important to us.

Miss Roberts: My other question, if I might very briefly, is with respect to the process itself. You mentioned the lack of trust in that, and you were not involved in the negotiation, or someone on behalf of the women were not involved in that. Have you thought about the process? Because the charter itself has some problems which we all know, and as we hear what the Supreme Court says, those problems may come to fore much greater than we anticipate right now.

One, how are we going to make this process work in a democratic society as we see it in the 1980s and the next century? Two, if Meech Lake does not go what process do we make, or do we do to get Quebec in?


Ms. Neville: You are talking about the future.

Miss Roberts: I would hope the future, yes, because that is what we are looking at. Meech Lake deals with the future and not the past. What process can we do?

Ms. Neville: Do you want to speak to that part Fran?

Mrs. Morrey: Yes. My name is Fran Morrey. I am the provincial vice-president of the Business and Professional Women's Clubs of Ontario, and come from Hamilton.

(Tape C-1035 follows)





(Ms. Neville)

~~... what process can we do. Did you want to speak to that?~~

~~Mrs. Morrey: My name is Fran Morrey. I am provincial vice president of the Business and Professional Women's Clubs of Ontario and come from Hamilton.~~

We are speaking about trust. I am a recent convert to this particular brief, and one of the reasons I am a recent convert is that I see a lot of déjà vu out there. I remember the previous government and the current one stating--and we have copies of correspondence with them--about how the funding of the separate schools would affect our communities and ourselves, and this was fine. In my political naïveté, I believed them, and then the Supreme Court came along and said, "Oh no, this is excluded." This is my problem: I believe you people. I really do.

Miss Roberts: We do not even believe ourselves.

Mrs. Morrey: I do believe you, but five years from now there is a remote possibility that none of you might be around. There is also the possibility that the whole tenor of the rights could change. All kinds of things could change in the next five years, and into the next century, as you said. This is what our concern is. If it is not specified and not open to interpretation by the courts, we feel we are protected.

As a women's group, and our mandate is for women--this does not mean we do not care about other people and other things, but we are one of the few groups that is basically interested in women. This is why we are here today. This is why we feel so strongly that this should be entrenched as a basic right, to say it is for the future that we are doing this.

Miss Roberts: I ask you to put your mind to the process, because the Constitution is not something that is going to stay static. It is going to change--

Mrs. Morrey: It is not supposed to.

Miss Roberts: We have just started. How are we going to make it a democratic process? That is all I would like to hear your comments on, because you have been involved in this for a number of years.

Ms. Neville: The thing is that Meech Lake and any constitutional accord should not be signed by government executive people before the contents and the proposals and the conclusions have had public airing. We saw this happen in the process of what became the 1982--I am always concerned that I am in the right century when I am talking about the constitution acts. We saw that process open up. It very nearly did not, but as women and through the ad hoc committee, which follows us, they were able to gather the women of Canada together to open up that process to women, in particular, with some very good results from it.

I see no reason why the premiers needed to sign that accord in May or in June without first bringing it back for discussion to their Legislatures and having full and open discussions about what their conclusions were about the way to go. They were obviously persuaded between May and June 6 by somebody

who got to know, around the aboriginal rights and the multicultural rights provisions not being well enough protected. I know some people say, "Oh, yes, but it is obvious that duality and distinct society have impact on aboriginal and multicultural concerns." I think it is also clear to us that women--50 per cent of society--also have some very special cultural aspects of their ways of thinking and so on.

It is possible to present these for discussion. I know we do not like green papers and so on. We prefer white papers. There is room for discussing. I cannot imagine a process that will continue where the executive group makes these decisions and then comes back and says, "Here you are folks. Sign it." I do not know how you as members of the Legislature can tolerate being presented with this without prior discussion with you.

Miss Roberts: The question is very simple. That process is not wrong. It is allowed under our system. I am asking you to put your mind to--you do not have to answer today--that process. You people have the resources. You have the background. You have the training, and you have all the creativity to look at a process that we can either put--

C1040 follows



(Miss Roberts)

~~...the resources, the background and the training and you have all the~~  
~~creativity to look at a process that we can put in the Constitution or~~  
through provincial legislatures. You can do something to make sure that  
process, that executive federalism, whatever you wish to call it, does not  
continue. It is not disallowed by our Constitution. We only look at it because  
we are saying it is not democratic, so although you cannot answer today, it is  
so important that you look at that process. I am just asking you, as an  
institution, as a group, that you do come up with something. Every year--it is  
frightening--we might be back here doing the same thing. What they did is not  
incorrect. It is not legally wrong.

1040

Mr. Harris: ?? come back in a half year. You had six weeks before  
you had to finally sign it. I agree with you; it is deplorable.

Mr. Chairman: I think there is no question that one of the items  
that has come up, apart from the substantive issues in the accord, has been  
the whole question of process. I do not think there is anyone who has appeared  
here--or in response to your mention of how we as legislators feel--we are  
involved in a situation which, if you like, was developed beforehand. We are  
trying to deal with it as best we can. I do not think anyone would want to do  
this again in this way.

I think you made a point about building in the discussion prior. There  
are a number of different ways that could be done. Obviously, that is  
critical. However we have done these things in the past and however  
constitutional or legal--because that is the way we have done them. Clearly  
that will not work any more. I do not think our system could maintain any  
credibility if people felt continually that they did not have a say somehow.

I think people are quite prepared to accept--if at the end of a fair and  
democratic process their view is perhaps not accepted, at least one feels one  
has had a kick at the can. I think one of the things we as a committee have to  
do is make recommendations around questions of process so that whatever other  
constitutional discussions we get into or whatever amendments are proposed,  
there is a clear, public participatory part of that process. Obviously, first  
ministers are going to keep meeting. Ministers will meet. Organizations and  
groups meet. Sometimes those are in private, and I think that is fair and a  
necessary part of the system as long as these other elements are there.

One of the things we are wrestling with is how to define that, how to  
perhaps describe what would be an appropriate process, and we hope that in our  
report on that aspect there may be some things we can say which will stimulate  
discussion and help us evolve. That does not deal specifically with Meech Lake  
here and now, but we know there will be other constitutional amendments down  
the road and we are going to have to be better prepared to deal with them.

Ms. Neville: I certainly appreciate your remarks in summing that up,  
Mr. Chairman and the gentleman to the right here--

Mr. Harris: Mr. Harris.

Ms. Neville: Miss Roberts, I assure you that we realize the process



was not illegal. I have gone as far as I can at the moment, and we will in future discussions of this, if we have any more ideas, certainly bring them back to you. The point is that it cannot go on in the future, as Mr. Beer was saying.

Miss Roberts: Very much so. [Inaudible] I understand your position. I am hoping you are not saying to me, "All we want to do is have something like the Meech Lake accord come and then we will have public hearings each time." I think you want to be involved in that process.

Ms. Neville: Exactly.

Miss Roberts: That is what I wanted to hear. Thank you. I understand your position.

Mr. Chairman: On behalf of the committee, thank you for joining us this morning. Your brief, as we have noted, is very clear, very specific. As we move through the hearings, we are very much aware that particularly in these areas, the clarity of the point of view of many of the women's organizations and individual women who have come before us. While we may have heard some of this before, it is always presented in a somewhat different focus, and because the group is different, the back ground is different. I think that is very helpful in ensuring that we understand that position. We appreciate your being with us this morning.

~~Ms. Neville: Thank you.~~

C1045 follows



March 31, 1988

(Mr. Chairman)

~~...ensuring that we understand that position, so we appreciate your being with us this morning. Thank you.~~

Ms. Neville: Thank you, Mr. Chairman.

Mr. Chairman: I next call upon the representatives of the Ad Hoc Committee on the Constitution, Daria Kiperchuk, Linda Nye and Nancy Jackman, if they would be good enough to come forward.

Ms. Kiperchuk: Good morning.

Mr. Chairman: Good morning. I believe we have circulated a copy of your presentation. If I might ask you to proceed with your presentation and then, as usual, we will follow up with questions, comments and thoughts and try to share.

Ms. Kiperchuk: Would it be possible to have a little bit more water?

Mr. Chairman: Yes, absolutely.

Ms. Kiperchuk: This is thirsty work.

Interjection: This is obviously thirsty work, yes.

Mr. Chairman: The thirstier end of the table--we will take that back and get it refilled. If you want to give us just a second while we--Please go ahead.

#### AD HOC COMMITTEE OF WOMEN ON THE CONSTITUTION (ONTARIO)

Ms. Kiperchuk: Thank you for taking the time to listen to us this morning. With me today are my colleagues, Linda Nye and Nancy Jackman. On behalf of the Ontario Ad Hoc Committee of Canadian Women on the Constitution, we appreciate the opportunity to present to you today the problems Ontario women have found in the Meech Lake accord and the reasons why we count on you to accept the challenge of helping us to fix them.

The Ontario ad hoc committee is an umbrella organization of women's groups representing over a million women in this province, including teachers, nurses, black women, women of ethnic origin, disabled women, francophone women--and the list goes on. We all care about this accord.

We first formed the ad hoc committee in 1981 to ensure that women had a strong voice in the 1981 constitutional process and specifically, to ensure that our equality rights were clearly written and well protected.

We were successful then in making some essential changes, but we had to reactivate the committee last summer--once again, to protect the Charter of Rights and Freedoms from risk, this time from the constitutional amendments proposed in the Meech Lake accord.

We want to start today by saying that every Canadian who cares about his or her rights and the protection of his or her rights understands the meaning of the word "notwithstanding." We use the word this morning to state clearly

~~116. J. J. J. J. J.~~  
link the two.

For our Prime Minister even to suggest this and more, to suggest that the smallest change would cause the whole deal to unravel, is to cut off Canadians from our right to take part in the constitution-building process.

In fact, we would argue that unravelling is exactly what we need. Let us look at this word. It is a knitting term. Let us look at why and when we unravel and exactly what happens when we do.

First of all, we unravel to correct a mistake, a slipped stitch, a wrong stitch, a forgotten colour change or some mistake in the tension. We go back only as far as the mistake, we fix it and then we carry on, building on the good part.

When do we unravel? Before we finish. We would never finish something with obvious flaws and then try to figure out how to repair it later. What happens when you unravel? Is it chaos? Do we end up with wool all over the floor and do we lose track of what we were working on and forget our original purpose? Absolutely not. We not change the purpose of the piece, the colour or the texture, we just unravel to get rid of...

C-1055-1



~~do we lose track of what we were working on and forget our original purpose?~~  
~~Absolutely not. We do not change the purpose of the piece, the colour or the~~  
~~texture, we just unravel to get rid of mistakes and make it better.~~

The term should not frighten any of us, any more than knit one or purl two. Indeed, we invite you to do some healthy constitutional unravelling with us.

Peter Hogg, a witness to this committee, told you that the process used to create this constitutional accord was flawed and must never be allowed again. He, and a few other as well, seem willing to tolerate this for the sake of getting an agreement, any agreement. We are not. We think that for a document this important the process itself must be right.

In 1981 and 1982, there was a massive lobby by women to protect our equality rights by adding section 28 and strengthening section 15. We put our hearts, souls, time and our money into that lobby because we knew then what we still know today, that a constitution can and should make a difference to my life and to our lives.

In 1982 we celebrated. We had all taken part in shaping our Constitution and we were hopeful and proud. Indeed, we thought we had ensured the beginning of real and full equality rights for us, for our daughter and four our granddaughters, for our nieces and our nephews.

Yet here today, six years later, none of us are celebrating. None of us have had the chance to be part of this Meech Lake constitutional process. Indeed, we have been told to leave it alone and accept what has been given. And the result? We have been given risk. We have been given a Constitution that puts our equality rights in a less clear and a less hopeful position.

We were always taught that a constitution is our country's statement of values, that a constitution in a democratic country clarifies and strengthens human rights. That a constitution protects people in the conduct of their daily lives.

I am proud and Canada is proud of its international leadership role in calling for the protection of human rights in other countries.

Yet in our own country, our first minister ask, indeed insist, that we stay out of the process and accept without complaint a Constitution that clearly weakens our equality rights, accept a Constitution that offers us confusion instead of clarification, risks instead of rights and accept their promises that everything will be all right; trust us.

However, even the most worthy politicians are not in office forever. In fact, only two of the 11 first ministers involved in 1982 are part of this Constitution amending process today and two of these men have already moved on in less than a year taking their promises with them.

It is not promises that our politicians must leave us with but a strong and clear Constitution that will endure much longer than a term of office.

We believe in a democratic process of constitution building and in our democratic right to shape the decisions that shape the future. Since this is

Ms. Jackman

C-1055-2

26

March 31, 1983

not happening, we believe that together, women and men, will put a stop to this undeniably undemocratic process.

But bad as it is, it is not just the process we object to. The substance of the accord shows the evidence of too hasty a consideration, too hasty a process, and too small a group of Canadians to see the problems being created for those of us excluded.

We are the ones to identify the problems and the risks that the accord holds for us. No one can do this for us, but you could do it with us.

Ms. Nye: First, you must believe us.

After Lowell Murray listened to the presentations of women's groups at the federal hearings, his response was that we have heard from the women, now let us hear from the experts. But we are the experts. We are the experts in our lives and have always been and now, we are the experts in how laws and political decision affect our lives.

But every time we tell our political representatives where the risk is and where the problems are they move the yardstick.

The Attorney General (Mr. Scott) insists that no witness to this committee has yet given an example which his ministry has not already examined and already dismissed long before these hearings even commenced.

~~Until someone succeeds in getting~~  
C-1100-1 follows



~~On this committee there yet to be an example which his ministry has not already examined and already dismissed long before these hearings even commenced.~~

1100

Until someone succeeds in hitting this target of something new, we are told that the dictate of the Premier (Mr. Peterson) prevails.

Mary Eberts illustrated in her presentation to this committee this constitutional double-speak and gave a brief history of how legislators have kept moving this target on us.

For nine long months, women's groups have been trying to hit these targets. Examples have been developed only to be dismissed as unlikely or unreal. Expert legal opinions have been researched, written, made public only to be dismissed as not expert enough. Yet have we seen even one of our governments subject their written legal opinion to similar scrutiny?

We wonder what is going on here?

A political decision seems to have been made to put at risk the equality rights in the charter and to make equality seekers absorb that risk. It seems we are told that it has to fall on someone's shoulders.

In November 1981, nine premiers and then Prime Minister Trudeau unilaterally imposed an override on rights in the charter. Women successfully defended section 28 from that encroachment.

Only six years later, through a side door, and supposedly without intent, 11 male leaders have again decided to expose equality rights to risk and to offer up annual kicks at a constitutional can as their assurance of justice for us.

Examples are not the arrows needed to hit this target. There is no hypothetical which can change this political reality. There is no expert who can change this. That is why in writing our brief we decided no more examples.

If you want examples, we would refer you to our legal opinion written by Mary Eberts and John Laskin, two constitutional experts, and to this committee's transcripts. In particular, we would refer you to the example in your transcripts of subsidized language training for recent immigrants and we invite the Premier and the Attorney General to go beyond omniscient dismissal and actually explain why our examples are unreal.

It is not just Lowell Murray who is denying our expertise. Our politicians, federal and provincial, still believe they can and they should do it for us.

Thus we get assurances when we raise our concerns. We are assured by some that we are wrong and that there is no risk to equality rights, by others that there is some risk, but only a little risk, and comforted by still others that it is not that much risk. Even though a constitution is supposed to clear up risk and protect against it.

We are assured that we need not worry because the worst will never



happen, even though a constitution is supposed to protect us when it does. .

We have a right to a constitution that clearly states that equality rights have the same status and the same protection as other constitutional rights.

We have a right to a constitution that clearly states that no amendments will infringe upon the rights and freedoms guaranteed in the Charter of Rights and Freedoms.

When women cannot get what is right through the political process, we are forced to turn to the courts. Once again, we are put at a grave disadvantage because the court process is very costly for women, not just in money that we do not have but in the time and energy that it demands. Our courts are still not as accessible or as accountable to us as they should be so they are not a comforting alternative for us and they are not the alternative that we want.

Canadians deserve a good constitution. We deserve a better one than we got in 1982 when Quebec was excluded. We deserve a better one than this accord offers in 1987 and we can afford a better accord.

An open process will give us that. We still have confidence in the system of government that we have worked so long and so hard to improve and safeguard.

Representative democracy has many built-in difficulties and you would know that better than anyone in this room. You are all elected MPPs. You do

T-1105-1 follows

~~...democracy has many built-in difficulties, and you would know that better than anyone in this room. You are all elected MPs. You do your best to represent the views of your constituents and when you do not know what they think you ask them. When you are not sure you know what they think, you ask them. You ask them if it is all right to put a stop sign here. You ask them if it is all right that a Hydro line go over there and if the Egg Marketing Board should have more or less power.~~

We have many ways for lawmakers to open themselves up to the voice of concerned citizens and to take that voice into account. As Canadians we cherish our democracy. We cherish an open and accessible relationship with our political representatives and constitution-making, we believe, is the most important work that we can do together. You have the chance to carry to the Premier and to the Ontario Legislature the clear and strong demand for amendments to this accord that people from all over Ontario have been presenting to you, and thus go a long way to addressing today's cynicism toward the political process.

This is an opportunity few politicians get and we urge you to use it wisely. It is a unique opportunity to turn this around and strengthen the process of nation-building by standing with us to demand that the accord reflect more than just the first ministers' vision of Canada. We are calling on you to champion the democratic process to turn this undemocratic process around and to ensure that the needed revisions to this accord, revisions that would fully protect the Charter of Rights and Freedoms from risk, are made with us and not for us.

Mr. Chairman: Thank you.

Ms. Nye: We would be happy to take questions now on our position and our feelings about the accord.

Mr. Chairman: I think one of the points that you raise relating to experts, if I can underline a fact that you undoubtedly know, this committee is not a committee of "experts." One of the important aspects of I suppose our political and democratic system is that many times, as elected members we are then called upon in some way or other to assess information, evidence, whatever, and ultimately make a decision.

I think it is fair to say that the experts may well differ on many aspects of an issue and somehow, out of all of that, we have to sift through and in our own way try to find out what is the--not necessarily the truth, although that is part of it--right and proper thing to do and where is the right and proper route to follow. While we accept that experts are important and are very helpful, I think I can underline that we do appreciate and realize that there is a lot more to a constitution than the view or the views of this or that constitutional expert, however good he or she may well be.

We can begin the questioning with Mr. Breaugh.

Mr. Breaugh: I think we may actually be getting somewhere for a change, and after the end of a very long process that is hopeful for me. I watched Pierre Elliot Trudeau dazzle the old folks in the Senate last night. I am not afraid to say for a moment that his vision of Canada and mine are, I hope, very different. I am not concerned about that and I am not concerned

Mr. Beauch

C-1105-2

30

March 31, 1983

about expert opinion. I represent about 77,000 experts on a wide variety of items from hockey to football to fishing and you really cannot get caught in the process of listening to what the experts say.

What I look for always is when I see a consensus beginning to build around a particular issue and I see a clear way to go. It is not going to be a way that pleases everybody, but there is a consistent analysis of what is wrong with something and what you might do that in a very direct way would correct that. I think we are getting there. One of the problems that I have encountered with this agreement is that it is all over the place on you. It is difficult to put a focus on what is wrong with this thing.

I think one of the problems that members of the committee have had has been, frankly, that people come in and say there are 95,000 things wrong with the Meech Lake accord and, as practising politicians, we are going to say we have never fixed 95,000 things at...

C-1110 follows.





~~... what is wrong with this thing.~~

1110

~~I think one of the problems that members of the committee have had has been, frankly, that people come in and say there are 95,000 things wrong with the accord and as practising politicians, we are going to say we have never fixed 95,000 things at one time in our lives so that is an impossible task.~~

I want to make reference to a presentation that was made yesterday by the human rights commissioner here in Ontario. For whatever reasons, he seemed to crystallize this argument about the Charter of Rights and Freedoms and to point to a solution which was at once not simple but direct. It seems that is what we need. We have talked, for example, about referring this matter to the courts and the problem is we cannot quite get agreement on whether that is a workable thing, on what it would look like, on how you would do that and whether it would really resolve the problem.

Yesterday he took several arguments from different groups, wove them together nicely around does the charter get slaughtered by this accord or not and pointed to a way to rectify that situation. I do not know whether you have read what he had to say to us yesterday, but I would ask you to do that because I think it had a bit of an impact on me that I was looking for. I want to get your comments on what I spoke about, the array of problems that people have presented to us. I think that has been one of our major difficulties; you cannot come in and say this thing is all wrong and these guys are all nuts. They may well be all nuts, but they are duly elected nuts and we have to contend with that.

What we are looking for is the consensus about what precisely are the major problem in this agreement and what precisely can we do, as a legislative committee, that would rectify that. We have seen a couple of groups now begin that process of building the consensus about where the major errors are and what precisely might we do as a nation, not just as one little piddly legislative committee, but what can the country do that would rectify the serious problems that we agree are there in that accord?

Ms. Nye: I think I would like to first start answering you by going back to this question of experts because I think one of the points we want to make is that when we are talking about expertise, when we are not talking about constitutional experts, we are talking about women and their knowledge and understanding of their lives and their ability to recognize when a document is going to cause problems for their lives and that this is the kind of expertise that is missing in the political process right now.

??Mr. Breagh: Exactly.

Ms. Nye: To answer your question about what do you do when a document is this bad, I think you have to address two things. You have to address the reason that this document is so bad and that sends you back to the process. I think that tells us all very clearly that this is not the way to build a constitution or to amend the Constitution. It tells us very clearly that we do not know how to do that yet and that we have a big job ahead of us to sit down together this time and find the ways to do constitutions and to

Ms. Dye

C-1110-2

32

March 31, 1988

make them constitutions that really reflect both men and women's vision of the future. So I think that has to be addressed.

I know, for example, that there has been the suggestion of a royal commission put to you. Whatever kind of study makes sense I think has to happen and then the expertise of women has to be involved in it. Addressing this document right now, I think it is important, out of those 95,000 problems, to focus on what the courts are doing with the laws that are handed to them. I believe what we see now is a shift in the courts to where they are really trying to balance values. Therefore, for us, that is why it is so important that it be clear that there is an equal balance between constitutional, cultural rights and the rights in the Charter of Rights and Freedoms.

From our perspective, we would say that addressing that balance and making sure that at least is clear would then give the courts an opportunity to define the charter, which they have not even begun to do yet--they certainly have not begun to do it with the specific sections that are the guts of our equality rights--and to allow them then to address...

C-1115 follows.



even begun to do yet, certainly have not begun to do it with the specific sections that are the guts of our equality rights, and to allow them to address the other parts of the Constitution and the constitutional amendments that have been put to it.

The only thing I would add to that is that I think, as well as addressing that, I would come back again and say that none of this should be done without the other half of the population. We have not been able, in the past 10 or 20 years, to redress the imbalance yet. The figures before us are still 700 and 800 years before we are equal in Parliament. Many of us do not expect to live that long and we do not want to wait.

Mr. Breaugh: I may not even do that myself.

Ms. Nye: We would like our governments to start inviting us into the process rather than going to such Herculean efforts to keep us out. So we would not like to see this document passed at all, even with one of the 95,000 mistakes fixed, without sitting down at the table with representatives from the women's community.

Mr. Breaugh: Let me pursue this just a bit. One of the things, in my experience anyway, that makes the political system go wrong is that when you let the politicians sit in splendid isolation and be very wise, that is a really dangerous thing to do. Of course, that is precisely what happened in this instance. In private session, 11 men decided to do something. You would not allow a rezoning to happen in any municipality in that manner. So what we have is that the process is then reversed. We now try to have a series of public hearings where we gather information and opinion and try to sort that through and decide what to do.

In my view, if we would only let the normal parliamentary process work, we could salvage this. That is to say, normally, if we were dealing with a piece of legislation, we would hold public hearings, we would move amendments, a parliamentary committee would consider whether this is right or wrong, how to fix it if it is broken, how to leave it alone if it is not. We would take it back upstairs into the chamber and 130 people would take a look at it.

We are struggling as to whether or not we can do that. I think that is a fair assessment of this committee's point of view at this moment in time. We have heard what the Premier of Ontario said. I did not go to the picnic on the front lawn, but that was just good taste.

Ms. Nye: Take our word for it.

Mr. Breaugh: So we are struggling with the political reality. I think it is true, if this committee can identify the things that are clearly wrong with the accord, and more than that, if we can identify the things that are clearly corrective action, and we have a consensus that is what we ought to do, the saving grace in this is that there is a political system at work, that 11 people could not go and change the Constitution of a country in private. They do have to bring it back through legislative chambers. People will have to vote. Whether David Peterson says there is a free vote on this or not, there will be people upstairs--I am convinced of it--who will analyse whether this is good or bad, and some will say, "It is so bad, I cannot bring myself to vote for that." So we are trying to put some balance in that.



Just in closing, I would encourage you to look at what the Ontario Human Rights commissioner had to say to us yesterday and analyse carefully one of his solutions. One of the problems we have had is that people can come before us with a range of concerns all over the place, but they are not really sure about exactly why all of this nervousness is in them. They cannot really point to one thing and say, "If you went in that direction, that would resolve my major concern."

I would have to say, in personal terms, there is a lot in the Meech Lake accord that I could care less about. It does not bother me one whit, nor anybody whom I represent. But there are some things in there that leave me with some rather nagging concerns about whether, wittingly or unwittingly, some great evil will befall somebody who means a lot to me. That is what gets my ears up. I am not really worried about the Supreme Court or the Senate or a whole lot of other things that are dealt with in there. As I must have said on a number of occasions, I do not share a whole lot of concerns and do not even want to have an argument about objectives or national standards or any of that kind of stuff.

There are some things in here that get my political ears in tune to something wrong. What I am searching for now is where is the consensus on precisely what is wrong in this agreement and just exactly what we should do that in a clear, straightforward way would rectify that. That is where you can help us.

C-1120 follows



(Mr. Breaugh)

~~something wrong. What I am searching for now is where is the consensus on  
precisely what is wrong in this agreement and just exactly what we should do  
the most direct straight forward way would rectify that. That is where you can  
help us.~~

1120

Ms. Nye: I think that if you went back through your transcripts, as I am sure you will all have to do, and if you take a close look at the presentations you have had from women's groups, you are going to find an incredible amount of consensus. We have not given you the exact wording, because that is what does have to be worked out by experts and that is what has to be worked out with the experts from a feminist perspective as well.

I think there is much more consensus around some of the major clarifications that this document needs than may even be apparent to you, since you have had day after day the onslaught of everything coming at you about everything. But I believe if you look through the women's presentations, you will find that we have looked through much of it through the same eyes and we have mostly the same concerns about what this document is going to mean for us, and further, for Canada and for the nature of the government in this country.

Mr. Offer: Thank you very much for your presentation. I agree with you very much with respect to the fact that if we went back over the transcripts, we would certainly see a consensus evolving. There is no question about that.

I want to carry on with the line of questioning that Mr. Breaugh has opened up, and it revolves around process. I use the words of your brief. In your brief, you have used the words "in the public debate," "the limitations;" you talk about Canadians being cut off from the Constitution-building process; you say that the process itself must be right; you talk about a democratic process and an open process.

My question to you is, can you share with us some framework of process? You have taken me right through your brief saying: "The process is not good. The process has to be changed. We need an open process. We need public participation in the process." You take me right to the edge and you do not help me with what type of process, especially from your standpoint, because you and your groups have been involved in this for many years.

My question to you is have you directed your mind to taking that next step and saying, "Here is a framework that we suggest might be workable," to meet the particular criticisms that go right through your brief?

Ms. Nye: I think the reason that you do not see the answer and the framework is that we do not believe we should be creating it without you, any more than we believe that you should be creating it without us. It is such an incredible question to ask how a country is going to build its Constitution and build in an amending process that we certainly have strong feelings, most of them centring around not doing it without us.

Our ways and means of being involved at this point you see before you. We spend our evenings, we spend our weekends, we struggle with these

Ms. Due

C-1120-2

36

March 31, 1988

documents. Our legal advisers, our friends who suffered through law school and got to the end of it, sit down with us and say, "This is the problem, we think." We put that all together and we work as hard to understand this document and the problems for us as you do, but we do it all in whatever time we can get. Actually, there is not an awful lot of time left over to build a framework for constitution-building as well.

Even more so, we believe that is a job we still have to do, but in there somewhere there has to be a way built in that invites women into the process now, despite the fact that we do not hold even close to an equal number of seats in the legislatures, even close to an equal number of seats in the senior bureaucracy or at any of the decision-making tables.

C-1125 follows





(Inaudible)

~~We do not hold even close to an equal number of seats in the legislative process, even closer to an equal number of seats in the senior bureaucracy or any of the~~

Mr. Harris: (Inaudible)

Mr. Breaugh: You have had your chance.

Interjection: Well, we are not going to work for you.

Interjections.

Interjection: I would like to add to it too.

Interjections.

Interjection: Exactly.

Mr. Harris: You could dominate. The whole Legislature could be female and you would not have been involved in the process.

Interjection: Yes. What a thing to have to say about the government.

Mr. Harris: Well, I am sorry, but that is the case.

Interjection: I think that would be very strange.

Mr. Harris: There is not a single MPP right here right who did not want to be involved, and none of us were.

Ms. Jackman: If every single MPP in this Legislature were female that would mean the Attorney General and the minister responsible for women's issues, although they might be the same person at the time of signing such an accord, at least would be responsible, perhaps a little more so than the incumbent at the time.

I would like to respond a bit to your question on process. What is going on here in a way is a process of reflection on what has gone on before. As Linda said, we have done a lot of that in the evenings and on the weekends, hiring babysitters and taking child care for friends so that they go off to meetings, doing all that kind of stuff. But reflection always leads to action, and if you are hamstrung like Mr. Harris--as is suggested that this committee may be--then it is a real problem.

Mr. Offer: I hope Hansard picks that up.

Ms. Kiperchuk: I think it would be fair to say that this is a learning experience for all of us in the country. I personally would have felt easier if the first ministers had come out of that meeting with some suggestions on a blueprint for process and offered it back to the House and said: "We are in the process of developing a new Constitution. It has only been repatriated within a very short time and we would like to consider changes, but first what we need to put down is how do we go about achieving those changes."

Had they come back with a blueprint for us to look at, but instead in a way it is like building a building and having a different architect design every floor. You wonder if the stairwells will meet up. No one has a sense of how high it is going to go.

Mr. Offer: Here is my problem on this aspect. Since the charter ?? 1931-82, more and more people are becoming very much aware that the Constitution, the charter and court decisions will impact or have the potential to impact on their very lives. Your last response was this blueprint for change.


Ms. Kiperchuk: Process.

Mr. Offer: That is exactly, but my question is, my concern is not so much the blueprint for change but rather if there is a blueprint for change, where is it going to plugged into a process so that change be commented upon, study reflected up and questioned, as we are doing right now?

I think as time goes on, it is going to be the responsibility of each province to have this type of framework; now they may all be different but that is another different problem. Certainly, as we are sitting in Ontario, I think that is certainly going to be a responsibility which we are going to have to come up with because this Constitution is going to be changed and reworked as time goes on and as it evolves down the years. But we have to have some framework so that we can obtain input when people come in and say: "This is how it affects me. This is how it impacts upon me. This is why I like it. This is why I don't like it. This is what I want you to keep in mind when you issue your report before the blueprint for change becomes change."

It all goes back to my initial question which is that we are going to be grappling with the whole question of process, what is required and what we sense is needed. We are going to have to have your help on that, as other groups, to suggest what you think is that framework which should be built now.

C-1130-1 follows.



(Mr. Offer)

~~going to have to have your help on that, as other groups, to suggest what you think is that framework which should be built on.~~

1130

Ms. Nye: Yes.

Mr. Offer: If you can suggest some things, and I know that you will suggest not just for women's groups, it is for all groups, for all people to come before to be a part, to meet the concerns and the criticisms that have run right through your submission.

Ms. Nye: Our recommendations, at this this point in time, I do not see how they could be anything more specific than to say, "Obviously, there have to be representatives from the provincial legislatures and the federal Parliament and, I would think, from at least a number of the municipal councils as well because the Constitution eventually touches us right down on the street and in our homes."

Then, I think you would have to look to the community and you would have to build a representative group of it, so that the major interest groups and women--and we do not consider ourselves an interest group--were sitting at the table with you and struggling as equals to come up with a process that allows us to design a Constitution that takes us somewhere and takes us towards the kind of country we want.

Further than that, I honestly would not think it would be appropriate, because I believe it would be like falling into the same trap as somebody else going off and figuring out how to do it all. I do not think any of us, all by ourselves or in our own particular communities, has the answer or even the answers. I do believe that today when things are so big, so complex and moving so fast, the best we can do is to sit down at the same table and come as close to what makes sense and is right and good for all of us, and then go with it, test it out, watch it and take care of it.

Another thing is that it has to be something that is consistent and constantly regular, that we do it; that we not do it once in 1987 and then come back in 2007.

Mr. Offer: Thank you.

Mr. Allen: I do not know who wrote this brief but I must tell you this is probably the most articulate and eloquent statement, I think, that we have had.

Ms. Nye: Women wrote that brief.

Ms. Jackman: Experts wrote it.

Mr. Allen: It is a marvellously drafted piece of work. Whoever has got those kinds of skills is probably going to make a tremendous impact somewhere because this is great language, and I compliment them on it.

Ms. Nye: We had a lot of passion moving us.



Mr. Allen: I can tell that. I think that extended analogy on unravelling is marvelous. There are a number of things going on in the brief as a whole that I would like to be able to get into, and obviously I will not. The purposes of constitutions: Are they to frame ideals or do they simply define structures that we can all work with and go about promoting our ideals, one with another, in order that the community can advance in a wholesome and healthy way?

There are two very different sorts of approaches to Constitution making historically and a lot of implications. Which one do you accept in terms of philosophy of--

Ms. Nye: It is probably one of the main questions that we would have to address before we could go any further on how to build one.

Mr. Allen: Yes. Precisely. You raise the question of risk. I do not think that my sense of a Constitution is one that is going to guarantee us against risk. I think that any way we go, there is risk; any language we use, there is going to be risk. I do not think we ever define reality sufficiently that there is no risk in the document.

If I could extend your analogy, the problem is not someone knitting and being able to go back to an error. The problem is, you have 11 different people knitting the same document and none of them entirely agreeing where the error is or how much you have to unravel in order to get back to that error and what the consequence are of whether any one of them will continue to knit his part of the document or his part of the fabric.

I wonder just what your assessment is of the...  
C-1135-1 follows.



(Mr. Allen)

C-1135-1

41  
March 31, 1988

~~and what the consequences are, and whether any one of them will continue to~~  
~~form part of the document or any part of the fabric. What I wonder is~~  
~~just what your assessment is of the consequences of not going ahead. I do not~~  
take seriously all that is said on that front.

It is true that, for example, I suspect that if English Canada broadly does stop the document for whatever reason, whether it is good stuff that you are giving to us this morning, of whatever it is, Mr. Bourassa has got a reason to become very defensive and to go to his public. He is going to have to escalate the issue in order to counter the opposition in Quebec and this hue and cry. I have been there recently. I have asked some people about it. I think that will happen.

What is your assessment of the risk and what is your bottom line over against that alternative scenario of, for example, at the the end of the day coming out of this with no accord and all of Quebec still not affirming the Charter of Rights, which you and I think could have a great impact for people in Quebec as well as in the rest of the country?

Ms. Jackman: I think it is quite clear that there is always some risk. There would even be some risk if the whole of the charter was in the accord. It is one reason to wait to see what the Supreme Court is going to do with cases before it, like the Andrews case, the Canadian newspaper case and other cases.

The ad hoc committee has consistently and always said that we are in favour of bringing Quebec into the Constitution. We have never asked for the scrapping of the Meech Lake accord. We have asked, as we have stated on page 3 of our brief very clearly, that nothing in it will abrogate or derogate from any of the rights and freedoms guaranteed in the Charter of Rights and Freedoms. That is how I would respond. What Mr. Bourassa has to do in Quebec he needs to do in Quebec. We are the ad hoc committee in Ontario and it is to you that we appeal. It is your and our political environment whose needs we need to meet primarily, knowing that we also want to bring Quebec into the Canadian Constitution.

Ms. Nye: I do not think we would see the best scenario as one in which, say, a province like Ontario suddenly stands up and says, "We will not pass this document." I think what has to happen now is that the same people who created this have to hear what is being said and have to go back to the table. They have to take the positions of women across this country, and there are a lot of women in Quebec, maybe some of them a little fearful of blowing their own community apart because to be pro-accord has been put on such a delicate level publicly. But there are many of our friends in Quebec who are standing with us and who in fact have not had a hearing process, some of whom would have even come to this committee just to be heard.

So I think it is not that we see a province and an English-speaking province rising up and saying, "No," and cutting this off at the knees. We see the need to be heard, for a legislative committee like this to go back to the Legislature and particularly to go to the Premier and the senior bureaucrats and senior ministers involved, and say: "This is not acceptable." You will have to work out together with the other premiers who agreed to this in the first place. What you can now agree with--that you can come back and it will have dealt with the major problems, at least, and hopefully would also be the

beginning of some kind of royal commission, or suggestion, or recommendation about how we are going to go about constitution-building, other than this kind of trial and error process.

This is the worst kind of trial and error process, because they get to try and we get to suffer the errors. We are not even allowed to say, "Well, you tried and here are the problems." We cannot believe that they would come out with this document and not call it a draft. We would never sit down, even if we stayed up all night--and we have stayed up all night with this document--and say that what we came out with in the morning was anything more than a darned good draft, and that what we wanted now was to have some input to help us make it better.

So we are saying that the English-speaking province--

C-1140 follows





msj  
(Ms. Nye)

C-1140-1

43

March 31, 1988

~~more than we issued good draft, and that what we wanted now was to have some  
input to help us make it better.~~

1140

~~So we are saying that the English speaking provinces need to take that  
message back through the premiers, bring them together and do it right this  
time.~~

Mr. Allen: What would you think of a process which entailed the Legislature of Ontario passing along side the Meech Lake accord, not as formal amendments, but a series of companion amendments, which we then would refer to the other legislatures of the country and pass an order of reference which would draw together representatives of all the legislatures in Canada to emphasize the political importance, the extreme urgency of the central points in the companion amendments, so that maximum pressure could be placed upon the premiers to look at this once again, but that if they did not, they would see the writing on the wall politically with respect to the absolute and critical urgency of doing it all in the immediate future in the wake of the Meech Lake accord, if that turned out to be the way it played out? How does that scenario--

Ms. Kiperchuck: Are you suggesting that the accord would be ratified with the companion resolutions that you speak of?

Given that we have acknowledged that the process is bad and it is reflected in the document, in trying to fathom Meech Lake, which is the title of Bryan Schwartz's book on the Meech Lake accord, he talked--and I do not know if anyone had had the opportunity of reading this. We looked at even presenting it, but I think it would have taken too long. It is an excellent, in-depth study of the accord. Bryan Schwartz is a constitutional expert and, in fact, was a consultant to the government in Manitoba. I just want to read to you a little part of this book, when he makes reference to the whole notion of looking at the accord in the second round.

He says that it requires disingenuousness or incredible naïveté to pretend that serious defects will be remedied during the second round and that no one should be satisfied with an agreement to look at defects in the 1987 accord in the second round. That would be like pleading guilty in a criminal case because you think you might win the appeal.

To me, that is what you are suggesting when you talk about presenting a companion resolution, that you are suggesting that we go ahead and hope that we could win it in the appeal. I think that we have been very clear in saying that the reason we are looking at a flawed document is because the process has been bad, we must put a stop to this kind of process, and that the Meech Lake accord should be revised to read that nothing in it will abrogate or derogate from any of the rights and freedoms guaranteed in the Charter of Rights and Freedoms.

Mr. Allen: I guess what I am suggesting is that the process is initiated for the future by this kind of technique.

Ms. Nye: Yes.

Mr. Allen: It is live and it addresses the issue, and I do not buy Bryan Schwartz's totally pessimistic scenario, but that is a matter of opinion, I guess.

Ms. Nye: From our point of view, it puts us further back and at further disadvantage. Because one of the problems we have with the Meech Lake accord is that it gives tremendous powers to provincial governments. One of the problems that we have with the Meech Lake accord is that it sets up, almost like a third level of government and one that, if anything, is even more distant from us as women in the community.

We would be in the position not of getting one honourable premier to stand up and be honourable, but to getting all 11 of them, in most cases, all 11 first ministers to agree to what we are arguing for when at least one of them probably is going to be responsible for the problem that we are coming up against. We are assuming that at least one of them wants some of this and therefore is not going to be the premier who is listening--

C-1145 follows



March 31, 1988

(Ms. Nye)

...we are coming up... are assuming that at least one of them wants some of this and therefore is not going to be the Premier who is setting when we come forward and say, "Well remember we said this was a flaw and you said that after you passed it into law you would look at it and readdress it?" Our problem of convincing them becomes elevenfold more of a problem for us. We probably have to spend holiday weekends, as well as all the other weekends and probably have to give up jobs which are at risk now anyway. It is just abhorrent to us.

We think the worst thing that could happen now is that you pass into law a bad law, a bad series of laws, a bad document, a flawed document. It is far too dangerous, as far as we are concerned, and we have no confidence that at that constitutional conference, our voice will actually be as strong as it needs to be. We do not even know who is going to be around the table at that constitutional conference and what happens when the promises made today do not mean a thing to the Premier who does not belong to that party and does not buy those promises because I was not there. For us it is absolutely unacceptable. We would not sit around the table and help you create companion resolutions.

Mr. Harris: If there were people in this Legislature who lost every battle that you are talking about and I disagree with what the companion resolution does. It does not say plead guilty and then appeal. It says we are standing here with 15 others all charged with different crimes and we all have to go down the tubes together or plead guilty or fight and stand together. You make a decision. I guess I am saying I do not think we are going to have a choice in the decision anyway.

Ms. Nye: I have a hard time understanding that.

Mr. Harris: I do too. Quite frankly I can sit here and argue that for the next five years and all I am asking you is if it comes down to that, is it not better to stand on your own as one issue and let us see the Premier who will stand up and say no to women's equality rights, as opposed to now where a Premier can stand up and say no to a whole confusion of mumble jumble of a multitude of reasons why it is not worth opening this thing up. I think a companion resolution is better than absolutely nothing. I think it does focus if the resolution is on one specific issue of equality rights or the supremacy of the charter or whatever. It then forces that Legislature and the House of Commons and the Senate and those premiers or the Prime Minister to say on that one issue. There is no more unravelling. There is nothing else. They have to say yes or no to that one issue. I think that is a lot tougher for them to do.

Ms. Nye: It may be a lot tougher for them to do but we would like to know why it cannot be too tough for them right now to do.

Mr. Harris: I understand that.

Ms. Nye: In fact, I was handed Raj Anand's resolution here. Talk about consensus. All the women's groups are saying the same thing as the Ontario Human Rights Commission. There are so many major equality seeking groups that know what we need. If it passes into law we have to live with it as a law until they fix it. We are right now in the courts. We do not have yet one decision that sets a precedent for the guts of equality in the Charter of Rights and Freedoms. They put it on the shelf for three years. We did not even get it until 1985. Now before we get to do anything with it, before we get to see what surprises the Supreme Court has in store for us, we are going to put



vs. Dye


C-1145-2

46

March 31, 1988

more between them and the equality rights that we so desperately need. We are going to put more between the Supreme Court and the decisions that we need them to make using the sections in the Charter of Rights and Freedoms. And so what happens when it becomes law and they sit down at the court and they look at this case and they say, "Well, yesterday I was dealing with this with respect to the Charter---

C-1150-1 follows



~~Chapter of Rights and Freedoms. So what happens when it becomes law and they sit down at the court and they look at this case and they say, "Well, yesterday I was dealing with this with respect to the Charter of Rights and Freedoms."~~ Now I have to say, "What did they mean when they did not protect these sections of the charter? What did these people mean when they did not do this or do that?" We cannot afford that. We are behind enough now.

1150

Mr. Harris: I understand. My question is if I lose all that do you want me to throw up my hands and say to hell with it or would think the companion resolution might make some sense? You would say forget it, let it go down the tubes? That is my question.

Ms. Jackman: I do not want to answer that question.

Mr. Harris: That is fair too. I understand it.

Ms. Jackman: If that is the only political option open to you I would certainly be glad to be involved in the designing of that resolution.

Mr. Morin: On page 2 you say it should not be ratified as it now stands, and it must not. Yet we hear experts like Mr. Gordon Robertson, who appeared before us, who was as senior adviser to Mr. Trudeau, and he said that if the accord was not to be ratified, that it would lead Quebec to separatism. Can I have your comments on that?

Ms. Nye: I believe that is the kind of argument that shuts down debate and cuts us out of it. I do not accept it as an argument. I do not believe it. I do not believe that this is the only deal Quebec would make with Canada. I do not believe that if we say, "Listen, we like most of this, but here are some of the changes that are needed." Some of it this is coming from Quebec voices as well. They would not sit down to the table and do it. I do not believe that.

Mr. Morin: You see we are told it took over 60 years to bring these feelings together and real specifics. It was an historic moment. First time ever.

Ms. Jackman: But it has taken 60 years to get rid of this ?? in the Constitution.

Mr. Morin: Now we say if we do not ratify it this is what is going to happen.

Ms. Nye: They have put us all in a very untenable position, but I do not believe it is an agreement at any cost.

Mr. Chairman: In a sense some of these are questions that of course we cannot answer and I guess that is all part of the balancing that is going on. I apologize for interrupting but we are terribly behind schedule and I know there were other groups who were hoping to make their presentations before we broke for lunch. I wonder if I might let Mr. Eves have the last question.

Mr. Eves: I will try to be very brief. I really compliment your

group on your presentation here today. The wording on page 3 that the accord must be revised to read that nothing in it will abrogate or derogate from the rights and freedoms guaranteed in the Charter of Rights and Freedoms I think hits the nail exactly right on the head and I could not agree more. I think if there is one change that absolutely needs to be made in this agreement before it is ratified, it is that one. There are probably some others that could be made, but my bottom line I suppose, everybody has a bottom line if you came down to it, it is this one.

I would like to see the Premier who would stand up and publicly say that he does not think women should have equality rights. If there is one out there I wish he would identify himself.

Ms. Nye: That is the dare that the Prime Minister should have given the country.

Mr. Eves: I wish he would. I really wish he would and if none of them disagree, then what is the problem with the amendment?


Ms. Nye: And this goes back to addressing the issue of how can we do this if Quebec will not link with us. If in fact the Premiers are saying, "We have no intention and had no intention of overriding the rights and freedoms in the charter," then how can we believe that it is a problem for them to go back to the table and make that clear? How can we believe that is going to be an issue that closes down Quebec and makes them want to leave, unless it is not true, that they have no intention of overriding equality rights and overriding charter rights. If that is the truth, then it is not out on the table.

Mr. Eves: That is exactly right.

Ms. Nye: It is not out on the table and that is not right.

Mr. Eves: I could not agree with you more. I want to make another comment briefly about the process. People are talking about how we can improve this process and it is too bad we did not have more open process at the beginning, but that is all behind us. I want to point out to this committee for the record another time, that this government and this Premier did have an opportunity. This Premier was asked a question in the Legislature shortly after the first draft on April 30, if he would---

C-1155-1 follows





March 31, 1988

(Mr. Eves)

~~but that is all behind us.~~

I want to point out to this committee for the record another time that this government and this Premier (Mr. Peterson) did have an opportunity. This Premier was asked a question in the Legislature shortly after the first draft on April 26, 1987 would not open up the public process exactly as it is being done now before the final draft was agreed, and he categorically denied public hearings on this issue at that point in time. In fact, I do not want to put words in the Premier's mouth, but I will paraphrase him, if I may, but his comment was to the effect:

"Can you imagine the amount of mumbo-jumbo. There would actually be some members of the public come forward with some ideas to improve the accord. Would that not be a terrible thing, if a member of the public actually had a better idea than one of the 11 first ministers and actually could improve upon the wording of the accord?"

This Premier missed the boat once. The process still has three more years to run. Maybe he will not miss it the second time. That is my final comment, Mr. Chairman. Thank you.

Ms. Nye: There is not enough time to do it right.

Interjections.

Mr. Chairman: I was going to say, as we end on that positive note, but I am going to have to be careful. I think one of the intriguing images that came up, as Mr. Allen was talking and we got into our knitting analogy, was the thought of the 11 first ministers that night knitting and weaving around the table and whether Charles Dickens might have had some kind of scenario. One perhaps should be careful about just how far--

Mr. ??Breaugh: ??I had enough of knitting yesterday.

Mr. Chairman: Yes. But knitting and unravelling, I suspect, are going to be strong images as we go through this whole issue.

On behalf of the committee, I want to thank you very much for coming. We have been in touch and in contact throughout this process. I know through your hard work a number of others have come before us, and I think it is quite clear that there is a statement, as you yourself have suggested, if we go back, as we will, through the testimony, that there are certain, I think, very specific and clear things that have been state.

As a committee, we have to wrestle with that. We have to. It is our responsibility. It is our responsibility in terms of our oath. It is our responsibility having been set up as a select committee of the Legislature to take that testimony and at some point in the next few months to back and try to determine what we can do to meet the concerns that we have identified as being ones that must be met.

Obviously there are problems in that, but also, and equally obviously, a Constitution is more than a simple statute. It is a fundamental part of our country. We are going to have to do that. I know that it is our intent as a committee to try to deal with those issues in a fair, open and honest way.

While, as Mr. Breaugh has said, you can never do everything, I think we recognize that we have to move forward. We cannot stay where we are. I guess that is our challenge. We appreciate you coming this morning and certainly not making the task any easier but saying what had to be said. Thank you very much.

Ms. Nye: Perhaps if we could help, we would make it easier. Thank you very much. We appreciate the opportunity obviously of bringing our concerns to you. When we did it at the federal level, we did not get very far. We were told even by the members of Parliament who agreed with us and in fact the Liberals of course put forth a number of amendments, many of which agree with the suggestions that have come to you, but we were told then that they would hold their nose and vote for it. When we look at the whole picture and say what can be done when all of the leaders of the political parties are clamping down on all of the members who are trying to represent their constituents, the only break we can see is if the members break. We do not see anything else. We know what kind of heavy responsibility this puts on you and we are really counting on you. Thank you.

Mr. Chairman: If I could next call upon the representatives of the Ontario Advisory Council on Women's Issues, Sandra Kerr, the vice-president, Ceta Ramkhalawansingh, a council member, and Bridge Vianna, executive officer. If they would be good enough to come forward.

C-1200 follows



~~if they would be good enough to come forward.~~ If I might, as everyone is getting organized, apologize on the timing, but I think we have found with this issue that it is important to explore some of the various concerns in some detail. If it means we have our lunch a bit later, I guess so be it.

1200

Ms. Kerr: You get your lunch ??sent in anyway.

Mr. Chairman: It is a pleasure to have you here with us today. I believe--yes--we all have a copy of your submission. If I can turn the mike over to you and if you could lead us through it and we will follow up with questions. Thank you.

ONTARIO ADVISORY COUNCIL ON WOMEN'S ISSUES

Ms. Kerr: Thank you very much, Mr. Chairman. I am Sandra Kerr and I am the vice-president and acting president of the Ontario Advisory Council. On my right was Ceta--here she is. Ceta Ramkhalawansingh, who is also a council member, and on my left is Bridget Vianna, who is our executive director. I thank you for the opportunity to be here today. I must confess that in our concern and hurry to ensure that we got here at 10:30, there are a few little errors in the numbering of the pages of your brief. If we had known we would have had time, we would have held them back there and corrected them, but please just follow along and the order should be correct, but the numbering will not be and I apologize.

Mr. Chairman: It sounds like a ??tall issue.

Ms. Kerr: The Ontario Advisory Council on Women's Issues, as you know, is an advisory body to the Ontario government on all matters pertaining to women. The council is in the unique position of being the government's only official advisory body on women's issues. This means that the government has made a commitment to listen to its views and recommendations, and this unique relationship allows the council to effectively critique the government's direction and policies and provide advice for direction.

There are 15 members on council, including a president and vice-president, all of whom are appointed by cabinet on a part-time basis for three-year terms. Members come from all over Ontario and meet on an average of eight times a year as a council body.

In addition to monitoring legislation, policies and programs related to the needs of women, council also does research and holds consultations with groups throughout Ontario. Council often acts as an advocate on behalf of Ontario women with the government, institutions, cabinet ministers and other organizations.

We come at this point in time to discuss with you the issues around the Meech Lake accord. The first one we would like to address is our concern in terms of the process. To this point, all of Canada has come to realize that the Meech Lake accord is not a truly democratic opportunity to amend our Constitution, despite Mr. Mulroney's assurances that the democratic process would be respected.



The process of the Meech Lake accord has been a perfect example of executive federalism, which might have been appropriate when the subject was rights between governments. However, the 1982 charter gave rights to the people and the process taken with the Meech Lake accord either forgot or ignored this.


Professor Beverley Baines in her presentation referred to the accord as the "men's round." We echo her sentiment, as indeed you have heard many before us. The accord, as drawn up belongs to the Prime Minister and 10 Premiers and excludes the people of Canada. This must be rectified.

Ontario women have great concern not only with this process of executive federalism but also, and more particularly, with Ontario's current process. Premier Peterson said in August that the accord could be changed if Quebec's "distinct society" provision derogated in any way from the rights of individuals, women in particular. Since then, he has backtracked to say that the accord should be ratified without amendment.

As the official advisory body on women's issues to the government of Ontario, we find ourselves confused as to the purpose of these hearings. Are we to speak "for the record" but not for the "ears"? Is there any point to present our views of flaws, indeed of risk or process, if in fact there will be no recommendations to go forward? Surely, there is no intention on this government's part to make a mockery of the consultation process? This committee does have the power to go back to the Legislature with recommendations, but does it have the will?

You have heard from many groups who are concerned that the Meech Lake accord jeopardizes their rights under the charter. Some questions that have been asked are: What commitment is the government making to ensure that aboriginal rights are dealt with as part of the Constitution?

C-1205 follows



(Ms. Kerr)

~~The many groups who are concerned that the Meech Lake Accord jeopardizes their rights under the Charter of Rights and Freedoms. Some questions that have been asked are: What commitment is the government making to ensure that aboriginal rights are dealt with as part of the Constitution? Is there, in fact, a timetable? Would provinces be able to restrict mobility rights of minorities? Does the unanimous amending formula prohibit the achievement of provincial status for the Yukon and the Northwest Territories? Does the accord, in fact, threaten Confederation and the structure of government in Canada?~~

As Canadians we are concerned about the above questions. However, as the Ontario Advisory Council on Women's Issues, our mandate is the concerns of women in Ontario, and we have restricted our comments to these.

It might be useful at this point to reflect on why women have such a deep-rooted concern around the Meech Lake Accord. Until 1980, women had no part in the constitutional decision-making process in this country. This was largely due to the fact that politicians and the senior bureaucrats who participate in this process are men, and there is no open consultation prior to decision-making.

In fact, women's rights would have continued to have been ignored but for the strong and swift national reaction by women's groups, such as you have just heard, which produced the current Charter of Rights and Freedoms.

To now face an amendment to the Constitution that once again ignores any concern for the risks of women's rights is appalling.

It has been stated by Premier Peterson that there is no proof of risk to women's rights in the accord. However, equally, there is no proof of no risk to women's rights. Arguments on both sides are hypothetical. Mr. Scott stated the accord could not be analyzed by some hypothetical alternative, yet no concrete assurance can be given that any such alternative would be purely academic. Women feel a risk because there is a sense that something can go wrong. Women are concerned by the very nature of patriarchal assurances of trust and by the assurance that changes to the accord could mean even worse. It seems to most women, however, that if you cannot prove factors on either side of an argument, the issue must be at risk.

You have heard presentations made by a number of women's groups and lawyers who state that the accord could potentially jeopardize the hardwon rights guaranteed by the charter. The Council, too, has heard that argument throughout Ontario.

Our desire to have women's rights secured is not at the expense of Quebec as a distinct society. Some way needs to be found to ensure that national reconciliation includes the rights of women, as well as the rights of Quebec. Over one half the population of this province, indeed, of this country, are women. The implication has been that some risks are more significant than others and that a timetable should exist to address these. Keeping in mind that the process to amend the Constitution is long, labourious and detailed, how long must women wait? In fact, has the accord created a hierarchy of rights?


Questions that should be addressed include: Can the Supreme Court of Canada interpret the "distinct society" clause as superseding gender equality rights of the charter; what guarantees will be given to ensure that new national social programs are consistent in both quality and accessibility to women; what measures will be taken to ensure that the mobility rights of minority women are not restricted and that they have access to language training programs; what guarantees are being offered to aboriginal women to ensure that they are consulted in any discussions concerning constitutional change; and indeed, what guarantees are being offered by the Ontario government to ensure that these fears are unfounded?

Ms. Ramkhalawansingh: I would now like to address the issue of Ontario's role in this process.

If, in spite of all of the arguments and suggestions that have been presented to you, the Ontario government is still determined to ratify this accord without change, we strongly recommend that Ontario take concrete steps to ensure that women achieve equality.

Over the years, our Council has made numerous recommendations for changes to legislation, policies and programs. Women in Ontario still have a long way to go before they are equal. For example, current Ontario labour legislation prohibits domestic workers from unionizing; sole-support mothers suffer from inadequate incomes and lack of support services; immigrant women do not have access to language training programs; and...

C-1205 follows





(Ms. Ramkhalawansingh)

~~... domestic workers from unionizing, some support mother's wages, from adequate from a point of view, obviously immigrant women do not have access to language training programs, and as another example, lesbian women are denied services and benefits due to their sexual orientation. In fact, the last change to the Ontario Human Rights Code made certain definitions around what is a spouse to, in fact, make that even more difficult to change. Those are pieces of Ontario legislation which you can, in fact, address to improve equality for women.~~

1210

The Ontario government must demonstrate its commitment to equality for women. Once again, we call for a review of all labour legislation in Ontario, including the Employment Standards Act and the Labour Relations Act. We would like to see the introduction of employment equity legislation as well as contract compliance program, and we would like to see some real pay equity laws in this province.

These kinds of changes will, in fact, introduce equality for women. We would like to see elimination of barriers for women in the education and health care systems. We would like to see improved access to services for francophone women, native women, disabled women and women from ethnic and racial communities. We would also like to see greater provision of affordable and accessible child care and housing, as well as the assurance of security of the person for women in today's society.

With the accord, we have seen a fair amount of devolution of authority to the provinces and with the existing authority that we have as the Province of Ontario, all of these are issues within the province's jurisdiction and you can actually take some real concrete steps to improve the equality of women in this province.

In addition, we would also recommend that the Province of Ontario adopt an advocacy stance with federal, provincial and territorial governments for the passage of laws, programs and policies which have as their objective the equality for women.

With respect to future process, we recommend that the government heed the suggestion of the Attorney General (Mr. Scott) to investigate ways in which the process for constitutional change might be improved in the future.

We believe that the Ontario government must consult openly with women and all kinds of women's organizations; minority women, ethnic and racial groups, aboriginal women and all other affected groups on an ongoing basis to ensure that their specific issues are part of the agenda at first ministers meetings dealing with the Constitution.

To be more specific, representatives of these groups should be invited to attend, as part of the Ontario delegation, so they are right there on the spot. Our council would be pleased to assist the government in the consultation process with these women's groups.

I think if you were to engage in this kind of consultation process, further changes would not be open to charges of this being a boys club.

Ms. Kerr: In conclusion, we once more call on Premier Peterspn to reconsider his stance and make these hearings a meaningful process.


We ask the Ontario government to firmly demonstrate its commitment to equality by reviewing legislation that is within its own jurisdiction to ensure equality for Ontario women, considering a companion clause enshrining commitment to equality in the Constitution, publicly consulting with women's groups and others before negotiating on constitutional issues with the federal government, and adopting an advocacy stance with the federal, provincial and territorial governments for the passage of laws, programs and policies which have as their objective, the achievement of equality for women.

We remind this committee to heed the Attorney General's statement that Canada has been built and sustained through political compromise. Surely, the risk of women's equality is important enough, is strong enough, and is indeed serious enough to warrant this government's taking a stand. Women account for half the population. Any national reconciliation must take into account women's equality rights.

Political compromise must include a guarantee of equality for all classes and groups of women in the accord.

Mr. Chairman: Thank you very much for your presentation and for the various recommendations which you have made in the paper. I will move right into questions. ...

C-1215 follows



Mr. Chairman: Thank you very much for your presentation and for the recommendations which you have made in the paper. I will move right into questions so that we can maximize the time available.

Mr. Harris: You point out the flaws and say the things but when it comes to your recommendations, I hear you saying something quite different from most women's groups who have been before us. You are saying approve Meech or you are not saying do not let Meech go ahead. You are saying do some other things, review legislation, consult for second round or the third round, whatever it is, play an advocate role and consider a companion clause.

Most of the groups who have come before us--you heard the last group--really do not want to talk about a companion clause because talking about it--and I understand this--says that this is an easy way for these guys to get off the hook. They can say: "Oh, we have done the right thing. We approved Meech but we put our two bits in for the second round and here is our companion resolution."

I do not know if I am being critical. I am trying to be objective.

Ms. Kerr: Did you want us to reflect on that?

Mr. Harris: Yes.

Ms. Kerr: I guess there are several possibilities to add to that and that is, first of all, I think we would all see that if we are talking about a companion clause that would be passed by Ontario, that coupled together with our urge for you to lobby and advocate with other premiers, that you would also advocate that other premiers in other provinces adopt the same sort of companion clause.

We offer the option of the companion clause because we sense that the reality is that the accord will not be changed, that even though, and we support all of women's stands in terms of saying, the risk is there for women, they realize and sense a risk but that the reality is likely not to mean a changed accord.

Whether that means that politicians are afraid to make amendments to the accord and therefore, we can opt into saying, "Well, we will make a companion clause and we will not call it an amendment because politically then we will be affecting the accord, but this way we can add our own rider that says this is where we stand in this province."

At least that puts it forward on the agenda together with the accord rather than ratifying the accord and leaving the equality question to some other future time at another constitutional hearing to be held. Our concern was, first of all, the reality looks like it is not going to be changed in any way, no matter who says what and the second option is that if that is going to be the reality, we want to see something up forward along with that ratification by Ontario that states, right now, that they understand where women are coming from with this accord and that there is a concern about their risk and that this be advocated with other premiers.

I do not think we are saying something different. I think we may be saying it differently, that is all.



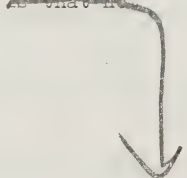
Mr. Harris: I think that other groups are saying in spite of what we have heard publicly and perhaps the election currently going on and the election of Mr. McKenna in the east has encouraged groups to say that there is a window of opportunity here to change these guys' minds. Most of the groups that have come before us saying, "We are not very happy with the process but we are here on the outside glimmer of possible hope that all the things we heard are not true, that you are willing to listen, that you are willing to make a change."

You really are coming here saying: "We cannot make a change. We accept the reality and here is the next step."

Ms. Kerr: No, we are not saying we cannot make a change. We come here saying and stating very definitely that there needs to be a recognition of the need for change.

Mr. Harris: Why would you not ask this committee, as opposed to a companion resolution, to put forward that resolution now, today? Ask the Legislature to pass it now and send it on its way? ~~Is that not~~

C-1220-1 follows



1220

Mr. Harris: ~~Why would you not ask this committee, as a companion to a companion resolution, to put forward that resolution now, today? Ask the legislature to pass it now and send it on its way? It does not have to be a companion piece of legislation. Its companion means we have lost the battle. It is over and done with. They have approved Meech. The next best thing is to send a companion resolution at the same time as opposed to a month later or leaving it to the first ministers to initiate. What is the matter with doing it right now? We have until 1990 to ratify this. McKenna is not going to approve this in the next six months, it does not look like.~~

Ms. Kerr: There is also an election probably going to go through, too, before that, federally.

Mr. Harris: Then why would you not advocate that?

Ms. Ramkhalawansingh: I think that unlike other organizations, the Ontario advisory council is made up of a number of very diverse individuals and individuals who have very differing opinions. We are not a homogeneous group. People are there from a variety of perspectives. In the process of our own consideration of the issue, we canvassed the opinions of a broad number of individuals.

I think that probably what you have in front of you is the current consensus of the council opinion. I think that there may well be some of us who would be willing to say what it is you have just indicated to us but I think we would only be saying that as individuals as opposed to a council opinion. The structure of our body is fundamentally different from that of other groups which have single interest or are much more homogeneous in their composition.

Mr. Harris: Can I ask one more question. You are the advisory council. You are appointed by the Premier (Mr. Peterson) or by order in council to advise the cabinet and the Premier. Were you asked for any advice before the May meeting?

Ms. Ramkhalawansingh: No.

Mr. Harris: Were you asked for any advice between May and June?

Ms. Kerr: No, we have not been asked for advice. We are presenting our advice.

Miss Roberts: In particular, I would like to bring your attention to page 11, your summary. I think you make it very clear in your first paragraph that you are asking the Premier to relook at it and to make these hearings a meaningful process. I assume that is what you based your summary on. Then you move into the area about asking us to look at the commitment to equality.

My concern, and I would like to have you reflect on it, is, is there anything in Meech Lake that you have been able to sort of put your finger on that says it is going to stop us from going ahead? It is going to put us at risk. That is what everyone has said. Is there anything in Meech Lake that is going to really stop us from moving ahead? It may put us at risk from moving ahead but is there any definite thing that can stop us?


Ms. Ramkhalawansingh: What do you mean? Women achieving equality? I am not sure what you mean.

Miss Roberts: That is right, yes. We are developing our equality and developing a society that is going to treat us as equal. I always tell people I belong to one of the largest majority minorities in the world. I think it is important that we know that we are in a changing situation. Is there anything that is going to stop us in that development?

Ms. Ramkhalawansingh: What I think the accord does is that it endeavours to set up a hierarchy of rights and therefore a hierarchy of equality and that is probably one of the fundamental problems with the accord, which groups and which characteristics and which issues should be more equal than others. That, in itself, is at odds with the fundamental notion that all Canadians are guaranteed equality under the charter based on, you know, thus and so, and I think it is that kind of situation with the accord that may create a problem in the future.

Ms. Kerr: You cannot get away from the fact that people perceive certain things within certain words and the way things have been done in the past. With the Charter of Rights, whether it can be absolutely proven or not, women perceive that they were now given an equality position that was their right within society and to then have that not enshrined in terms of the constitutional amendment in the accord, the perception is that no longer is this right there, that is has now been put down the line...

C-1225-1 follows





March 31, 1988

(Ms. Kerr)

~~...then have that not enshrined in terms of the constitutional amendment and the record, the perception is that no longer is this right there, that it has now been put down the line further down the road for interpretation as opposed to actually part of our Constitution.~~

Miss Roberts: That refers back to the problem of not even having various sections of the charter already dealt with through the courts in the appropriate manner.

Ms. Kerr: That is right.

Mr. Chairman: I regret that because of the time this morning--we do have one other witness to hear--that I cannot take another question, but I am afraid we are going to have to cut it off at this point. I want to thank you very much for coming. I think we have this morning, in the presentations that have been made, both in your own and the two prior, explored in pretty extensive detail concerns that have been brought forward by women's groups and from women's perspective, and I would like to thank you very much for joining with us this morning and presenting your brief.

Ms. Kerr: You are very welcome.

Mr. Chairman: If I could ask Arthur Milnes if he would be good enough to come forward. A copy of your presentation is being circulated, and in order to make full use of the time, let me quickly turn the mike over to you, and we will follow up with questions when you have concluded.

Mr. Milnes: I understand we are running late, and I see some hungry looks on the faces of the members of the committee, so I imagine that and the fact that I am very nervous, I might speed up a bit and try to move right along.

Mr. Chairman: Please do not feel alone. Just while you are getting to feel less nervous, let me state that we have had a number of people who have appeared as private citizens, and we welcome that. Undoubtedly in any committee hearing you receive presentations from various groups and organizations, some of which are quite used to this sort of thing. I can assure you that we are not intimidating persons, and we want you to feel very much at home. Just go ahead and make your presentation.

ARTHUR H. MILNES

Mr. Milnes: We must first ask ourselves why this country we call Canada ever came into existence. The odds against the British possessions on the northern half of this continent ever uniting themselves into Confederation in 1867 must have appeared insurmountable to observers at the time. History, geography, culture, to name but a few, all combined in a seemingly concerted effort at keeping the people of British North America apart.

Canada lacked a uniform cultural nationality for its people. Instead, two great races split by history, condition and, most of all, split by language, populated the land. The people native to this country lacked a feeling of belonging to either of the European races that had invaded and stolen their soil. We were therefore a nation in which a nationality could not

be relied upon to occur naturally. It had to be created.

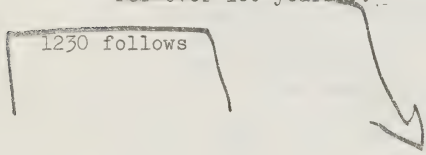
On the southern borders of the colony, there stood the colossal giant called the United States of America. In 1867, the United States had just finished a great and bloody civil war, leaving almost a million of her people dead. The armies of the United States were massive at this time and her government was filled with hostile intentions towards the empire of which we, as British North America, were a member. The huge population, a growing industrial might, and the American desire of expansion all seemed to threaten us.

The climate and the terrain faced by the people of British North America was among the harshest faced by anyone on the face of this earth. In the days before the conveniences that are provided us by modern telecommunications, the distances seemed great and the land threatened to envelope us. And spread over these distances were a people who even when one ignored the obvious differences of language, these people still lived a different regional experience, depending on which part of Canada one lived in. In other words, there really did not seem any hope that our country could have come into being.

In order that the Canadian miracle could happen, there was one essential ingredient that was required. This ingredient was a special one and each of the Fathers of Confederation carried it inside himself. Unfortunately, it seems that the men who drew up the Meech Lake accord lacked this quality. The quality I speak of is that of vision. When dealing with a Confederation such as Canada, the quality of vision involves the ability to go beyond regional prejudices, the ability to understand the wishes of others, the ability to engage in constructive debate with the willingness to compromise and the ability to put aside self-interest and to see the needs of the whole. In short, the Fathers of Confederation had the courage and the vision to beat all the odds and to conceptualize a better place for us together. They saw a strong nation, a nation called Canada.

~~Not over 100 years...~~

1230 follows



March 31, 1988

(Mr. Milnes)

~~At first, the Fathers of Confederation had the courage and the vision to beat  
all the odds and to conceptualize a better place for us together. They saw a  
strong nation, a nation called Canada.~~

1230

For over 100 years, this vision has worked well for us. It has by no means been easy, and our history is filled with many examples of times when the Canadian vision was obscured. But even during times of war, times of depression, times of hardship, the vision was not put completely aside. Canadians have not given up on each other, even though doing so would have been the easiest route to take. By staying together, we have built ourselves a great country, one that is envied the world over.

The Meech Lake accord, with its provisions, threatens this country and all that we are. Had we been governed by a set of constitutional rules like the ones proposed in the Meech Lake accord, all that we have accomplished would not be. Canada would have broken up long ago to be swallowed up by our huge neighbour that is America. The Meech Lake accord provides us with a quick road to the destruction of the Canadian nation. If not stopped, or at least reopened for debate and amendment, then all that we are, all that we have been and all that we could be will have been lost. A nation will cease to exist and in its place 10 new ones will arise and take the place of where there once stood a single Canada.

The change in our Constitution which I find most disconcerting is found in subsection 2(1) of the accord, which states:

"The Constitution of Canada shall be interpreted in a manner consistent with

"(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and

"(b) the recognition that Quebec constitutes within Canada a distinct society."

Having thus quoted from the Meech Lake accord, it might help if I translated this constitutional language or constitutional mumbo jumbo into something that those of us present who are not constitutional lawyers might therefore understand. In effect, what these amendments tell us is that from now on there will no longer exist one Canada; there will exist two. Instead of a single Canada, one that is bilingual, one that is multicultural, there will now exist two Canadas, each defined by its language.

In agreeing to the Meech Lake accord, those Canadians who reside outside Quebec are saying we no longer have the courage to live with the French language. We are saying, "Go back to Quebec because we only want to speak English. The Canadians who speak French have decided to withdraw behind the walls of a distinct Quebec. Those who speak French outside Quebec have been quite effectively written off in this document. Where is their vision and where is their courage in this?"



It has only been 19 years since the Official Languages Act came into being in 1969. The great progresses in terms of tolerance and in terms of respect that have been demonstrated by both French and English speakers in this country, that have been made since the 1960s, these are to be turned back.

We had only just begun to spread the use of both languages across the whole of this land, and I cannot argue that this has been accomplished easily. Yes, we have had our problems, but surely Canadians, especially Canadians of my generation, are beginning to see the advantages of living in a country of two languages, and rather than being scared of such a prospect for our future, we are excited by it, but in all this country, there is still much work for us to do, as New Brunswick stands as our only bilingual province. Yet now, as a result of the Meech Lake accord, the dream of a single bilingual Canada is to be frozen long before it has had the chance to be realized. To those who disagree with my interpretation, I ask that they read subsection 2(2) of the accord, which states:

"The role of the Parliament of Canada and the provincial legislatures to"--and I underline this--"preserve the fundamental characteristics...referred to in paragraph (1)(a) is affirmed."

Thus the status quo of language in this country is to be preserved. We are speaking of a status quo which has a supposedly a bilingual country of nine unilingual provinces out of a total of 10. With these facts, our leaders have asked us to preserve a situation of language in this country, but if one studies our history, one can see what this will lead to, and it will lead to separation. Instead of the promotion of our official languages, an unacceptable status quo will be preserved.

To make matters even worse, after giving us the amendment to preserve the status quo, we are then told, and I quote again from the accord, "The role of the legislature and the government of Quebec to preserve and promote the distinct identity of Quebec...is affirmed."

Criticizing this aspect of the Meech Lake accord does put someone like myself in a difficult position. I am not from Quebec, I am not a French-Canadian and thus some might say I am ignorant of it. But all I can say to that is I can only do my best in understanding Quebec, and since I believe Quebec to be a part of Canada, I believe I too have a stake in her future.

It seems to me that this clause puts a wall around the province of Quebec only seven years after the people of Quebec said yes to Canada in the referendum of 1980. I thought the walls were supposed to come down, not be put up again.

An eminent Quebecer recently wrote: "The real question to be asked is whether the French-Canadians living in the province of Quebec need a provincial government with more powers than the other provinces" (C)

1235 follows

(Mr. Milnes)

...An eminent Quebecer recently wrote, and I quote from his "speech":  
"Question to be asked is whether the French Canadians living in the province of  
Quebec need a provincial government with more powers than the other provinces."  
I believe it insulting to us to claim that we do. The new generation of  
business executives, scientists, writers, film makers and artists of every  
description have no use for the siege mentality in which the elites of bygone  
days used to cower."

If those in Quebec need this constitutional wall around them, which I  
believe they do not, why is it worded in such an ambiguous way? I have scanned  
the records and there is little agreement as to what in terms of actual power  
for the government of Quebec this clause will really mean, as I am sure was  
outlined to you this morning by the two groups that I was fortunate enough to  
listen to. What about the rights of women as outlined in the Canadian Charter  
of Rights and Freedoms? Can these be stripped away in order that the distinct  
society clause be promoted? What of the rights of native Canadians that still  
have to be addressed? Can they be stripped away? Can this clause steamroll  
over these kinds of things in the promotion of the distinct society? It  
appears to me that nobody knows what we are talking about here.

I make no claims as to being an expert in constitutional law. But from  
the little that I have studied I do know the importance of a constitution on a  
nation's existence. It thus seems very obvious to me that to blindly throw  
such a phrase into the supreme law of our land is to commit a very highly  
dangerous act.

Before much time has passed this document with its cloudy wording will  
land before the Supreme Court of Canada. It is not possible for us to guess as  
to what sorts of interpretations that the learned justices of the court will  
arrive at when this document arrives in front of them. The duty of our Supreme  
Court is to interpret laws, not to dictate them. But the Meech Lake accord  
effectively hands this power of dictation over to the Supreme Court as our  
elected leaders have run from the duty of decision making which their job as  
elected leaders demand that they do. Rather than our leaders giving us clear  
concise meanings for where they wish to take our country, our leaders have  
instead taken the easy route and they have left it up to others in the Supreme  
Court to provide these meanings.

The society that we find ourselves in is one that has built up a great  
safety net of social programs. Canada is a compassionate society and we make  
great efforts and spend large amounts of money in order to alleviate some of  
the negative effects of 20th century industrial capitalism. This is not to say  
that we cannot be doing much more as there still exists great inequalities of  
wealth and condition across this country. But certain foundations have been  
laid and we can build upon these as needs arise.

It is important to note that it has been the federal government in  
Ottawa that has led the way in providing most of the services of the Canadian  
welfare state. Without Ottawa's efforts we would lack family allowance,  
medicare, unemployment insurance, to name but a few. These programs find  
themselves in areas of provincial jurisdiction and only through shared-cost  
programming have these been able to have been undertaken. The federal  
government in Ottawa, the only government elected by all Canadians, has been  
able to set the standards for social programs from sea to sea, as we saw with

Mr. Milnes

C-1235-2

66

March 31, 1988

the early Canada 1980 Canada Health Act. But under the Meech Lake accord, it is unlikely, if not impossible that there can be any future expansion in social welfare programming on a national scale.

Meech Lake tells us that provinces are entitled to "reasonable compensation" if they choose to opt out of any future share-cost programs. This compensation will be provided if the provinces put into place programs that are "compatible" with the "national objectives."

Once again this accord provides us with language that is really beyond anyone's comprehension. Does anyone out there know what the term "national objectives" really means? Perhaps it will mean that great inequalities of access and inequalities of social programming will exist across the nation. But most importantly, the Meech Lake accord does not tell us who will decide what these national objectives are. Before Meech Lake, one might have assumed that the federal government in Ottawa would have had the power to set these national objectives. But now one gets the funny feeling that this power will be taken away from the federal government. Premiers might now argue at their enshrined first ministers' meetings every year that they hold this power and then, in effect, Canada acquires a board of directors to direct this new Canadian corporation. In other words, instead of a single, national program offering the same to Canadians from Port aux Basques to Port Coquitlam in British Columbia, there will now exist 10 separate programs. If this is true, why then should we exist together at all.

If the Meech Lake accord is to be approved as now written, has anyone stopped to consider what will happen to the federal government? Over time, Ottawa will begin to operate while wearing a constitutional straitjacket. She will be unable to assert any form of national leadership or national vision as she will be subject to the control of the provinces. One of our former prime ministers once posed a question that made many stop and consider such a scenario for the first time. I think the time is right now for us to consider this question again so I ask using Pierre Trudeau's phrase, "Who shall speak for Canada?"

Look at the plans that Meech Lake has for the Senate of Canada. As the senate exists now, it is the subject of much national loathing and the subject of constant debate. I can state from experience that politics professors like--

(Tape C-1240 follows)





(Mr. Milnes)

~~"Who shall speak for Canada?"~~

1240

~~Look at the plans that Meech Lake has for the Senate of Canada. As the Senate exists now it is the subject of such national loathing and the subject of constant debate. I can state from experience the politics professors have~~ nothing better than to ask our views on reform of the senate in their papers or in their exams. Canada is a democracy yet the upper chamber of our parliament is unelected by Canadians. It is filled by patronage. The 1984 election campaign showed that Canadians were sick of patronage run wild. So here we have an institution that satisfied nobody and in need of reform or abolition. I am not an expert, I do not know which one. But all that Meech Lake does is to transfer this source of patronage over to the provinces and to basically ensure that this institution will never be reformed.

We must be aware that the powers of the Senate of Canada are immense. I find it difficult to believe that once given this power that the premiers would unanimously willingly give it up. Because of Meech Lake's impossible amending formula, we could be stuck with an archaic senate, controlled by the provinces that will stand for all time. The provinces will now be able to veto the federal government with the convenience of not even having to leave Ottawa itself, as they can do it in the senate. But that is not all the power that Meech Lake gives over to the provinces. Remember that the Supreme Court of Canada will now also be appointed from lists supplied by the provincial premiers. Where is there any balance in this system? Ottawa is left at the mercy of the provinces. For those who once again say I take a too negative view, just look back at our history and try to consider what would happen if Premier Duplessis had been able to operate in such a system as Meech Lake now proposes.

I could go on and provide many more examples of what I believe to be erroneous in the accord. But as members of a committee that have spent five weeks hearing submissions about the accord, I am sure you know it both in and out. I am obviously not an expert on federalism. I am not an expert on the constitution, and the many other areas that the Meech Lake accord takes in. Though lacking in the impressive credentials that many of you have heard before you have there is still something that qualifies me to present my views here.

That is I carry within me a passionate love for my country, and a guy with great faith in our future. Many have provided you with arguments that are based on reason and political reality. I make no such claims. At its central core, mine is an argument that is based on a love for my country that has grown as I have. It is this that has brought me here to Queen's Park because I believe the Meech Lake accord is one of the greatest threats ever presented to this country.

I fully recognize that many conceive of Canada in a different way than Pierre Trudeau or Sir John A. Macdonald, or Sir Wilfred Laurier, and others did and do. There have been other who have articulated different national visions and purpose than that advocated by these people and others. I am willing to debate different conceptions of Canada as I know it is most healthy that a nation constantly re-examine itself. But in the Meech Lake accord, I



Mr. Milnes

C-1240-2

68

March 31, 1988

find no national vision or no conception to debate. This document is completely bankrupt of any sort of national dream. If Meech Lake is passed then I fear that the dream is over. The great experiment called Canada has been ended and most sadly has been ended from within.

My presentation is now nearing its end. I would like to thank the members of the committee for allowing me the honour of presenting my views here at Queen's Park. It is not every day that I get to do something like this. I thank you for listening to me. I hope the members of the committee will see fit to recommend that the Ontario Legislature reject this accord as now written.

For a final word on this matter I will turn to one of the greatest men of vision whoever occupied the national stage in this country. Having lived in his home town of Kingston, and if any of you have been to Kingston you will know it is Sir John A. Macdonald's home town and studied at Queen's University so I would find it most difficult not to mention Sir John A. Macdonald in such a speech. The warning he gave the Canadians of his day, I believe, should be heeded by ourselves as we consider the Meech Lake accord today. I quote from Sir John A. Macdonald."

"We are a great country and shall become one of the greatest in the universe if we preserve it. We shall sink into insignificance and adversity if we suffer it to be broken."

Thank you.

Mr. Chairman: Thank you very much for a very thoughtful and passionate presentation. I think your views have come through very clearly. I am not sure if we are keeping track of these things, but it seems to me that in one form or another Queen's University has certainly provided a fair bit of comment on the Meech Lake accord before this committee both in terms of--


Mr. Milnes: I do not think they do at Queen's.

Mr. Chairman: Most of them do it. Different points of view have been expressed from there, but we thank you very much for coming. We will start the questioning with Mr. Harris.

Mr. Harris: It was an excellent paper, by the way. I enjoyed your thoughts. I want to comment very briefly on a couple of things and then get to what I think is the heart of the agreement. You go into that in some detail.

I am not convinced that the national objectives is very difficult to understand. I think by spelling out compatible national objectives in the constitution when the federal government--

(Tape C-1245 follows)



For example, that "national objectives" is very difficult to understand and I think by spelling out "...compatible with the national objectives in the Constitution," when the federal government proposes a cost-sharing program, they will state in the legislation, "Here are the national objectives of these programs," and that will be there.

Mr. Milnes: Why was this not enshrined in the first ministers' meetings? If that is true--and if this happens, I hope it is--why then was this not spelled out more?

Mr. Harris: It is. It says it will have to be compatible with the national objectives.

Mr. Milnes: What are they?

Mr. Harris: They will depend on what the program is. I think it will now be incumbent upon the federal government, when it wants to get into provincial jurisdiction, to say, "Here are the national objectives of this program that we are proposing."

Mr. Milnes: Then every province says no and you end up with 10 separate programs everywhere, so a Canadian in Newfoundland gets a different--

Mr. Harris: No. The only way a province can say no and get compensation is to satisfy ultimately a court that it has a program that is indeed compatible with the national objectives, which the federal government would have the sole authority to outline.

Mr. Milnes: But does the federal government have that sole authority? If it does, then I have missed something.

Mr. Harris: Sure it does. It is a national program. That is the way I interpret it.

Mr. Milnes: I guess I take a different interpretation of it.

Mr. Harris: I am not particularly happy with the Senate, but I do not think it is any better or worse than what is there. Everybody seems to think that the provinces now are going to control the Senate and the Supreme Court. If I were the Prime Minister of Canada and a premier put forward an appointment whom I suspected was not eminently qualified to represent indeed the national interest, I would not accept the appointment. I would just say, "I am sorry."

Mr. Milnes: So what do we do, go back and forth forever?

Mr. Harris: You could go back and forth forever. That is how stalemates are broken.

Mr. Milnes: Do you want a Senate appointed by a Duplessis for 20 years?

Mr. Harris: If I was the Prime Minister and I suspected that Duplessis put somebody forward for the wrong reasons, I would say, "Sorry."

Mr. Milnes: What about the argument that he is elected by the people of that province, the Senate is appointed this way, so therefore, how can the Prime Minister turn that down?

Mr. Harris: All he has to do is say no.

Mr. Milnes: Can he do that?

Mr. Harris: Of course he can.

Mr. Milnes: But the Senate is now appointed from a list supplied by the premier. The premier is elected in one jurisdiction, elected by the people of this province. So therefore one might argue, how can the Prime Minister turn that down?

Mr. Harris: He just says no. Ultimately what would happen is what happens right now. There is a basis of consultation right now between the Prime Minister and the premiers of the various provinces. You are assuming the worst-case scenario, that somebody has this ulterior motive of putting forth somebody not because he will be a good senator but because, "I can control that guy and he is going to do exactly what I want as premier of this province." You are assuming that, so that is a worst-case scenario.

Mr. Milnes: I do not think in the 1970s Premier Lougheed would have appointed senators who would have gone along with Mr. Trudeau.

Mr. Harris: He cannot appoint anybody under Meech Lake. The Prime Minister appoints.

Mr. Milnes: Appointed from lists supplied by the premiers.

Mr. Harris: That is right.

Mr. Milnes: You are assuming that the Prime Minister has this power to say no and that we will not go on and on. If that is true, let us outline that completely.

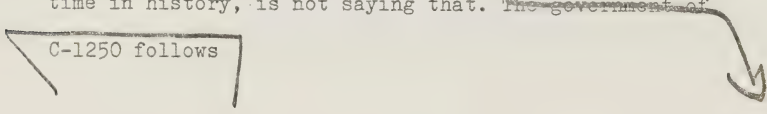
Mr. Harris: I do not see anything in Meech Lake that says he does not have that power. So I am not persuaded that these are big problems.

The main part of your brief deals with how we see Canada, the language issue, the Quebec issue and the whole reason for Meech Lake. I think you have hit the nail on the head as to how Canadians see Canada developing. The difficulty I have with what you propose is that you have given us a vision, I would argue compatible with Trudeau's, of a Canada bilingual enough in Alberta that the people of Quebec will not feel threatened by not having special status, that it is a bilingual country, that francophones will be comfortable.

Mr. Milnes: In Meech Lake you are ignoring the over one million francophones who live outside Quebec. What about them?

Mr. Harris: I agree with what you are saying. However, you are saying that what you want is achievable, but the government of Quebec, at this time in history, is not saying that. ~~The government of~~

C-1250 follows



but the government of Quebec at this time in history is not saying that. The government of Quebec does not agree with you.

1250

I suppose ultimately somebody has to say, "This government of Quebec does not represent the people," in order for your view to prevail or Trudeau's view, as I heard it spelled out last night. Somebody has to stand up and say: "You, the government of Quebec, are wrong. That is not what the people of Quebec want. We know what the people of Quebec want better than you know what the people of Quebec want, and we therefore reject that vision of Canada, we reject Meech Lake and we reject the demands for a distinct society." How do you see that playing out?

Mr. Milnes: I guessed right that that was probably a question that was going to be fired at me, "Well, Art, if you reject the accord now, what is going to happen with Quebec?"

Mr. Harris: I am one of those who thinks it is why you reject the accord. If you reject it because you feel women's rights have been derogated in some way, that is one thing. But I think you are telling me to reject this because the demands that the government of Quebec has put forward, the desire to be a distinct society, the desire to be recognized as different within Confederation, is not what I in Ontario think the people of Quebec want.

Mr. Milnes: I go to Quebec and I can say in many ways it is distinct, obviously. When leaving Kingston and going to Quebec City, it is different. But to throw that into the Constitution blindly, as I see we are doing, I think that is obviously dangerous, as I outlined.

If you are correct and, in order to get Quebec into the constitutional family, we have to have Quebec designated as a distinct society, why do we have to lobotomize or castrate the federal government in order to do that? I do not understand that. That is another one of my points. If we must agree that Quebec is a distinct society, what is all this other stuff? Why are we doing this to Ottawa?

Mr. Harris: There is some of the other stuff that I agree with you is a problem and some I have said I do not agree with you, but I am really zeroing in on the problem that you are presenting to us as the Ontario Legislature. One of the reasons you say I should reject Meech Lake is because the government of Quebec is really not articulating what is good for the people of Quebec. I do not know if anybody knows what they really want. I do not know if I know what I want when I grow up. Maybe I will know.

Do you understand how difficult that argument is for Ontarians to make, that we reject that the provincial government of Quebec or the Premier of Quebec is indeed speaking for the people of Quebec, and that is not what is good for Quebec in the long run? "What is good is what we tell you is going to be good."

I suggest to you it is one of the reasons why Trudeau could never get Quebec to sign and would never be able to if he lives for another 100 years and is Prime Minister for 100 years. He always said to Quebec, "I know what is good for you, I know what you want," and he always rejected the government of



Mr. Harris  
Quebec.

Mr. Milnes: Trudeau did something very important. He recognized that there are a million French-Canadians living outside Quebec. That is very important. In this, you are writing them off. You are saying basically you are to preserve these little clusters of minorities and that is it. OK, I take the worst-case scenario.

Back in 1982 Quebec did not sign up, but you were dealing with a French-Canadian Prime Minister from the province of Quebec, which had 74 or 75 seats at the time. So we can get into an argument as to who actually did represent Quebec at that time, was it Premier Lévesque with his majority or was it Prime Minister Trudeau? Right now is it Brian Mulroney with 55 seats? I do not know.


What I am saying, if we really must do this, let us talk about it. Let us do something about it. Here are 11 men getting together overnight, walking out and saying: "Here is the document. Do not debate it, do not talk about it. This is it. It is written in stone." What I really resent is Mr. Mulroney's and Mr. Bourassa's underlying assertion, "If you do not support me, then you are a bigot, you are anti-French-Canadian, you are anti-Quebec." I reject that completely.

Mr. Harris: You can appreciate the difficulty we would have in rejecting it on the basis that we do not think Quebec's interests have been properly represented by the government of Quebec. We can reject it if we do not think Canada's interests have been--

Mr. Milnes: OK. What if that is the case? -

Mr. Harris: What you are saying in your brief to me that Quebec-- So we need another mechanism then, I would suggest. I do not think we...

C-1255 follows



~~represented by the government of Quebec. We can reject it if we do not think  
Canada's interests have been~~

~~Mr. Milnes: Ok. What if that is the case?~~

~~Mr. Harris: But you are saying in your brief to me that Quebec as  
we need another mechanism then. I would suggest. I do not think we can do  
that. Maybe we need a referendum in Quebec again. I do not know.~~

Mr. Milnes: I do not know. I understand that is a bad document. Let us start again.

Mr. Harris: Ok. ??Let us start.

Mr. Allen: I guess we are all aware of the axial role that Kingston has played in the constitutional development of the country. It may well be that we have some new initiatives developing here that may carry us on into the future. One can hope that is the case. I certainly appreciate the spirited presentation and the argument within it. Having been brought up also in the contest of teaching Canadian history, that has emphasized the Macdonald vision of the nation and the reassertion of that by the Creightons and the other historians of that period.

I am not certain in my own mind that Meech Lake compromises all that. I do not think what happened was that in order to bring Quebec in in section 2 that somehow or other there were lobotomies and castrations performed in the rest of the document that somehow eliminated the powers of the federal government. Because what I see happening in the document is, in the immigration area, a clear assertion of the primacy of national standards and criteria with regard to immigration, which has never been in the document before, in the shared jurisdiction of immigration.

I see in the spending power the first assertion in the Constitution of the right to spend money in exclusive provincial jurisdictions. I see the maintenance of federal power to appoint Supreme Court judges from nominees presented by the provinces and the power to reject any nominees that they consider unworthy, and to ask for new names. I recognize there is a possibility for impasse in that and in the Senate appointments, and that may lead to the occasional tussle. That may be one way one way which we resolve national problems in the future. Every nation goes through that. I do not find that a problem. I think that federal power therefore remains really impressively strong in the document.

On the language question, it is very easy for us, as anglophones, to say to ourselves, and living outside Quebec and to say a bilingual idea is where we ought to go, as though somehow or other acceptability of language in all parts of the two languages in all parts of the country is the nub of the issue. It is a working relationship and a working arrangement to get that. I think we have made great strides in that direction recently. I do not think that it compromises that for us to recognize that in a way, unlike the rest of the country, Quebec functions, for the most part, in another language and that there is consolidated there a history and an approach to legal questions, and what have you, that is different that is the culture; it is the base of that other language. Therefore somebody, especially the provincial government is the most immediate and direct level of government pertaining to that whole

area. It has a special role to play in not just maintaining but in promoting that overall identity which, I hasten to say, includes a very large and historic anglophone minority--and increasingly, some other groups as well.

I do not see a document that says that that is so and that maybe slightly tilts in new ways some new opportunities for Quebec to be the principal homeland of the French language and to defend that cultural base, which then animates the capacity of other French groups across the country in important ways to live their language in the country as well.

Mr. Milnes: Within the French groups outside--

Mr. Allen: Why do we see that as fracturing, and as breaking up, and as consolidating two Canadas when all we are talking about is the culture presence that this is the living element of the bilingualism?


Mr. Milnes: What about the French Canadians outside Quebec?

Mr. Allen: Pardon?

Mr. Milnes: What do we tell the French Canadians outside Quebec?

Mr. Allen: What we are telling French Canada outside Quebec--there are some very important things, and you made that point with Mr. Harris and I want to speak to that. What we have done in several provinces is in Meech Lake we have in fact required several premiers, who have been prepared to say that it is their role--

C-1300 follows



important things, and you made that point with Mr. Harris and I want to speak to that. What we have done in several provinces as we have in Quebec is, we have in fact required several premiers, who have been prepared to say that it is their duty to preserve the French minority, now to say that is their role indeed. Up to this point, Mr. Vander Zalm, or Mr. Ghettys, have never been prepared to concede those things. So that is an advance. In Ontario ??--

1300

Mr. Milnes: Why is it not promoted though? Why is it not promoted like the distinct society is?

Mr. Allen: Pardon?

Mr. Milnes: Why is it not promoted like the distinct society is?

Mr. Allen: Why is what not promoted?

Mr. Milnes: The preservation of subsection 2(1) the ??of French-speaking Canadians outside Quebec. It is just preserved. Just leave it alone--preserve it.

Mr. Allen: It says preserve. That, I think, is a concession to the fact that you have not been able to get language even that strong with regard to part of the country. In Ontario, I think we are passed that. I think we are doing more than preserving already, because we have allowed the French community to govern their own schools through new mechanisms. We have allowed them a whole range of new services in dealing with government. That comes under more the French term which is used, "proteger."

Mr. Milnes: We have not enshrined those rights though, have we?

Mr. Allen: No, and that, I think, is the important next step that we have to do in Ontario, is to say for us to preserve and protect, to use the language of the French and the English versions, is in fact for us to insist that there has to be enshrinement of French rights in official bilingualism in Ontario. That is our duty. That is the way we should read that language and we should do that. But I think it would be impossible for us to get more and preserve for many of the other provinces at this point in time.

Mr. Milnes: If Quebec is recognized as a distinct society, then why should there be bilingual programs in Alberta to communicate with the federal--why should you have to speak French to work with the federal government ??at all? Why?

Mr. Allen: That is precisely the reason--

Mr. Milnes: ??Quebec is a distinct society because of its predominance of French language. Is Canada not the home of the French Canadians? Maybe I am a dreamer or something.

Mr. Allen: But Quebec is also the home in a unique way. We have been trying to find language this. We have used the words the "foyer principale," the principal homeland, and therefore it has got special rights and responsibilities to play that role and it is precisely because it is there and



Mr. Allen  
it is nurtured--

Mr. Milnes: Under the current federal system, they have protected them for hundreds of years.

Mr. Allen: It is precisely because it is there and it is nurtured and it is healthy in Quebec by a local regime whose concern is to do that that it is important and necessary for Saskatchewan and Alberta and British Columbia to have their special arrangements and their special programs which enables them to deal with Quebec in their own language and for them to provide the context in which Quebecers, who live in that culture, can move and travel on their ??time, if you like, or perhaps permanent, in those other provinces and to find something receptive that makes life possible and liveable in that area.

Mr. Milnes: That is just what I brought up though. If Quebec is recognized--if it is distinct because of the French language, then why would these programs have to be instilled in Alberta, in Ontario and in Manitoba? Why?

Mr. Allen: Because we are still with that foyer principale--we are still one united country.

Mr. Milnes: Ok. That is where I disagree. I see you are creating two Canadas there. You are saying that the dream--ok, maybe I was out with my ??teaching assistant and my politics course ??went out and I showed them my papers--

Mr. Allen: That is where all this came from.

Mr. Milnes: No. He effectively tore it apart and a lot better than you guys have.

Interjections.

Mr. Allen: Who is he? Maybe I know him.

Mr. Milnes: He said, "Art, you are a dreamer." I do not know. Maybe I am naïve. Maybe I am a dreamer, but I am a Canadian. When I go out to Vancouver, when I sit with my friend from Vancouver, yes, his being brought up in British Columbia and my being brought up in Scarborough--definite differences there. Yes, I guess I would be distinct and that I would still support the Toronto Maple Leafs or whatever, and he would not, so I guess I am a dreamer there, too. But we are still Canadians. I cannot ??that. Why so much--but there is something there. We are more than this provincial--I am more than an Ontarian. Yes, I am from Ontario. I am a Canadian. Maybe I am naïve, but I think the Quebecer wants to feel that too. Someday he can go to Alberta, he can go to Newfoundland and maybe it is a dream, but I think, unless we want to avoid Quebec being separating eventually sometime and that is our only hope that someday we can do this, where a French Canadian can feel at home in any part of the country and that I can feel at home in Quebec if I start doing a lot better in French than I am now and everything--ok, I am a dreamer then. I do not know.

This dream that Laurier and Macdonald had and that Trudeau had is a lot better than--I am just saying Meech Lake is saying: "That is it. There is no . . .

6 Tape C-1305 Follows

~~Ok, I am a dreamer then, I do not know.~~

~~This dream that Laurier and Macdonald had, and that Trudeau had, is a lot better than I am just saying. Mechl. Dave is saying, "That is it. There is no more dream. Quebec is distinct. We will keep it like that. We will perhaps preserve these little French minorities. Basically, we are a collection of provinces. We are not a country anymore. We are not Canada anymore. It is just I am from BC. I am from Ontario. And we get together at first minister's meetings to carve up the pie every year monetarily."~~

I think there is more than that. There is more to my being Canadian.

Mr. Chairman: I wonder if maybe it is an appropriate time to end with a dream. I might be allowed to comment that I think your dream for Canada has greater hope for realization perhaps than the dream for the Toronto Maple Leafs, unless things improve drastically.

I hope that what you take from the questions is that we are dealing with some things here that are extremely complex. I suppose this country, in a sense, has been dealing with that French-English dichotomy and the place that Quebec, as an entity, has in all of that, and there are no kind of right and wrong answers. I guess in our history we have struggled with that one, and somehow trying to bring together the dream of a bilingual country or at least a much more bilingual country with, at the same time, the recognition that Quebec is different and can be part of that and how do we recognize that in some meaningful way, and understanding all of these things. That is very central to I guess a lot of the constitutional discussion that we have been involved in over the last 25 years. We do not have a concrete answer.

I think you raise questions that clearly we do have to struggle with. We thank you very much for coming. I hope you will feel that you can come on other occasions, on other issues.

Mr. Milnes: Yes. I always have an opinion on something.

Mr. Chairman: I am sure. That is good. We appreciate that. Thank you very much. Enjoy your lunch.

The committee stands adjourned until 2 o'clock.

The committee recessed at 1:07 p.m.



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, MARCH 31, 1988

Afternoon Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Clerk: Deller, Deborah

Staff:

Madisso, Merike, Research Officer, Legislative Research Service

Witnesses:

Individual Presentation:

MacKinnon, Catharine A., Constitutional Lawyer

From the Canadian Association of Law Teachers:

Ziegel, Jacob S., Co-Chairperson, Special Committee on Judicial Appointments;

Professor, Faculty of Law, University of Toronto

Gall, Gerald, Co-Chairperson, Special Committee on Judicial Appointments;

Professor, Faculty of Law, University of Alberta

Individual Presentation:

Bordeleau, Andre G.

From the Council of Christian Reformed Churches in Canada:

Van Eek, Arie G., Executive Secretary

Van Ginkel, Aileen, Research and Communications Associate

AFTERNOON SITTING

The committee resumed at 2:12 p.m. in room 151.

Mr. Chairman: Good afternoon, ladies and gentlemen. We can begin our afternoon session. I would like to call upon our first witness for this afternoon, Professor Catharine MacKinnon, a constitutional lawyer and political scientist. She has taught at Yale, Harvard, Stanford and most recently at the University of Chicago and Osgoode Hall.

I understand that next fall you are going to be teaching constitutional law and sexual equality at Osgoode Hall.

Dr. MacKinnon: Yes, I will.

Mr. Chairman: I am sure this whole topic is going to provide years of teaching material if one just looks at the testimony before our committee.

I want to thank you very much for coming here this afternoon. I will let you go ahead with your presentation, following which we will go ahead with questions.

CATHARINE A. MacKINNON

Dr. MacKinnon: Actually, the controversy on the Meech Lake accord has provided me with, among other things, an in-depth, quick immersion in the law and politics of Canada. I am deeply honoured to be asked, as a citizen of the United States, to address this committee on this deeply Canadian issue.

As an American constitutional lawyer and a political scientist working internationally in the area of sex equality, I am going to offer for your consideration a comparative perspective on the potential impact of the Meech Lake accord on women's equality.

From my observations of the debate to date on the accord, I have noticed that when women ask questions about the impact the accord may have on their legal rights, they are reassured that the issues are not legal, but political. When they then ask questions about the impact of the accord on their political status, they are reassured that the issues are legal and will be dealt with by the courts. Across cultures, this gives rise to a certain suspicion that the politics of men have in fact created the law for women, have been the law for women, at the same time that the laws of men have determined women's relative standing within the political order. In order for this not to happen in Canada, it seems that a combination of those expertises you have sought out--that is to say, political with legal analysis--is necessary to make a realistic assessment of the meaning of this particular provision.

Comparatively viewed, the Canadian Charter of Rights and Freedoms is advanced beyond any comparable instrument in the world today in promising full citizenship to women. Its combination of equal protection of the laws with specific nondiscrimination guarantees, together with its substantive recognition of disadvantage and support for affirmative relief on a constitutional level, singles it out in laying a legal foundation for some of the most significant advances in sex equality ever to be made for women under law.

The Canadian commitment to diversity, with the political mobilization of the women's community that the charter has occasioned, has produced a very particular equipoise among the various bases for nondiscrimination under section 15 and also an equipoise between equality rights and other rights throughout the charter. This means that women's interests, for one thing, are not divided by the charter between those based on sex on the one hand and those rooted in language, culture, nation, religion, ethnicity and race on the other. In other words, a unitary approach to social inequality is structural to the charter and possible under it.

The Meech Lake accord disturbs this structural equality among equality rights and threatens to qualify, limit and undermine both the charter's distinctive legal contributions and, equally important, the climate of political will so crucial to a realistic delivery on their promise.

In a comparative perspective the experience of the United States with sex equality rights, or more accurately I should say rather the lack of them, may be instructive. Sex equality in the United States has constitutional dimension essentially only by analogy. The equal protection clause of the 14th amendment was passed to respond to a perceived emergency to the unity of the nation; that is to say, white America's history of imposing chattel slavery, social segregation and disenfranchisement on black Americans. In other words, the equal protection clause was, if you will, part of a national reconciliation, the need for which had been created by these institutions of racial bigotry.

The equal protection clause is gender-neutral on its face, although in fact part of it is actually written to address male citizens only. But the rest of it is gender-neutral on its face, and does not mention sex, but then again, neither does it expressly mention race. Attempts to add express sex equality guarantees to the US constitution, which would have removed at least the question of whether the US government is committed to sex equality from the contingencies and vicissitudes of shifting political winds and shifting majorities, have failed.

In 1971, the equal protection clause was first applied to gender and has increasingly been used ever since, largely moving forward through an extremely uneven and often inadequate process of analogizing sex to race. The experience of the difficulties of attempting to achieve sex equality, not on its own terms, as is possible under the Canadian Charter of Rights, but through analogical method, has served to highlight the dangers for all women, including women of colour, of elevating some bases for prohibited discrimination over others.

Section 2 of the Meech Lake accord enters the field of rights selectively, potentially elevating some cultural rights over equality rights. Section 16 of the accord enters the field of equality rights selectively, potentially elevating some equality rights over others. By combination, the "distinct society" clause, with the guarantees and recognitions of aboriginal and multicultural rights, are then structural to Canadian federalism and equality rights are not. Some rights are more important than others and some equality rights are more equal, in Orwell's phrase, than others.

1420

This poses concerns for the effective pursuit of sex equality, which is relegated to a nonstructural constitutional plane. It poses concerns for the vitality of section 15's protections from discrimination on the many bases



section 15 covers, all of which are crucial for the advancement of women. It poses concerns for the coherent and predictable development and even development of section 15 jurisprudence. It also poses concerns for balances to be struck in cases of potential conflicts of rights, both under section 1 and otherwise, because some constitutional rights are thereby given more weight than others.

Examples have proven treacherous in this area, and this has not escaped my attention, largely because whenever the possibility of anyone treating anyone else unequally is raised, someone is insulted. No one wants it implied that they would institutionalize sex inequality. I think it speaks well for Canada that the value of equality is so widely held that no one wishes to be considered, even hypothetically, as a possible perpetrator of sex discrimination.

However, the fact is that across culture, sex inequality has been more the rule than the exception. All cultures, all groups, have discriminated. Most do now and I dare say most will at some point in the future, at some time, in some way, discriminate on the basis of sex, very often without intending, meaning or knowing that that is what they are doing. In fact, often it is not thought that the allegedly discriminatory treatment is discriminatory, because it is thought to be so important under some other set of values, for example, values like culture, religion, privacy or freedom of expression.

There are, in fact--need one point out--two sides to every case of sex inequality and the issues are often decided between them on a matter of interpretation. It is when there is doubt about whether a case is really a case of sex inequality, and it is the nature of legal actions that there is often that doubt, that the weight given to equality rights in the ultimate equation is dispositive in the outcome. It is also a bit difficult to be required to give examples of what might happen under a particular legal state of affairs and then be told that, because these things have not yet happened under a legal regime that is as yet untested and uncertain, all these examples are merely hypothetical.

However, example: were a significant advance to be made in an area covered by the accord, analogies to the areas the accord does not mention would not necessarily be as available as they otherwise would, with the charter now structured as it is with these rights in clear equipoise.

Suppose that a significant advance were made in, say, the recognition of some group's cultural rights and an analogy were sought to support a parallel initiative for women's rights, women at once both having a culture and having been denied a culture through inequality, but both women and the other cultural group being threatened by the dominant culture, the accord would be persuasive in undercutting the full applicability of such an analogy as precedent in a case that was based on sex equality.

One also wonders, could, for example, hate literature laws be upheld over an expressive rights challenge as applied to, for example, Jews, with the added support of Meech Lake but not, were such laws amended to cover sex, supported as applied to women, who of course might not be found to have the support of the accord.

By another example, suppose after Meech Lake native women chose to challenge some sex inequality within the tribes and the rule that they challenged as discriminatory was defended as a necessary and integral part of



aboriginal culture and aboriginal rights. One could argue that the tribal rules which are male dominant are not in fact truly aboriginal for those tribes whose inequality on the basis of sex tends to date since contact with the west. This does not address the issue, of course, of whether native women should resort to the charter, but merely, if they chose to do so, whether they would meet a deck stacked against them on the basis of gender.

It seems that the interpretation of the charter could well be structured against such a sex equality claim, not to mention the rather obvious fact that many features of angloculture are predicated on sex inequality and thus could be defended as part of multicultural rights.

In this area, which you might find to be farfetched, I suggest for your consideration the problem of pornography. If a statute were passed as a way of furthering women's equality rights, one of the ways it could be attacked would be not only as a restriction on subsection 2(b) rights, that is, expressive rights, but also potentially as an expression of cultural rights. If you think that is farfetched, I think perhaps you have not litigated against the pornographers as I have. Particularly for the American pornographers, nothing is farfetched.

You might note that none of these examples is specific or particular to Quebec women, whose situation under the accord, it would seem to me, is probably in no more jeopardy, and I would say given Quebec's laws and other factors of their political culture, may be in less jeopardy than the rights of women elsewhere throughout Canada.

The point is, both litigation and legislation that is pursued to guarantee sex equality can be opposed already by other charter provisions, and the Meech Lake accord would give additional support to those other charter provisions. When this occurs, equality rights are unequally situated in a way that they are not now under the charter without the accord. To ask whether the accord overrides the charter is thus not precisely the issue. There will be conflicts of rights within the charter, and the accord takes sides in those disputes.

I have also noticed there has been something of a double standard of proof in the discourse on whether equality rights should be added to the Meech Lake accord. This committee has been told, for example, that sections 2 and 16 of the accord are hortatory and largely symbolic, that is to say, not strictly legal. Yet one searches your transcripts in vain for concrete examples of how the "distinct society" clause, which is clearly essential to the fair deal that Quebec was promised, is concretely contemplated to change legal outcomes in particular cases.

Clearly, it was included, however, because someone thought it would make a difference. The difference has been explained in these terms: (1) it was important to bring Quebec into Confederation; they required it and they count; (2) it grants legitimacy and recognition to the distinct society. Then the rationale for section 16 is provided on a similar level. It provides: (3) reassurance that the rights of cultural groups and aboriginal peoples will be respected.

Section 2 may not be adequate for the rights of French people outside Quebec, and section 16 may not be adequate for the rights of many cultural groups or for aboriginal peoples, but the voice of women was regarded in this process as so negligible that it was seen as something that could afford to be ignored entirely.

When women then ask in essence, politely but firmly as one does in Canada, "Is it not important to bring women into the Confederation?" they are treated as if their consent to this structure of government can be assumed. No one seems very worried that they might be alienated from the state or that they might regard such implied consent as coerced consent, as they have made clear they do, for example, in cases of marital rape.

Have you not, I would ask, seen evidence that women might require some form of national reconciliation? When women ask for legitimacy and recognition for women's equal place under this state, they are told it is so obvious that it would be redundant. But if it is redundant, it was redundant for at least aboriginal groups and multicultural peoples. If it is redundant, what is the harm in stating it and why is there resistance to it? Apparently, it would add something that someone who counts does not want it to add.

The only other answer to this question, I have heard, is that if women are granted equality rights under the Meech Lake accord, many other issues will have to be reopened, in other words the perennial slippery slope question. Perhaps they should be reopened. Also, women are over half of the population. They are not like any other group and their interests are not like any other interests. They are in fact half of virtually every other group.

When women ask for reassurance that the pact the charter made with Canadian women is not being impliedly abrogated, they are told that it is only a matter of interpretation, and as Mary Eberts put it, they say, "'Trust us.'" Yet concrete guarantees were considered appropriate to provide a comparable level of reassurance to other groups, other groups that matter, other groups that one cannot help noting include men as well as being half women.

The accord apparently gave some satisfactory answer to the question, "What does Quebec want?" It did not however answer the question, "What do women want?" because as has so often been the case worldwide, those who made the decision apparently did not even ask.

In your hearings, you have been told that the insult of women's exclusion from the Meech Lake accord has no practical significance because the accord

#### 1430

In your hearings, you have been told that the insult of women's exclusion from the Meech Lake accord has no practical significance because the accord is merely interpretative while other sections of the charter are rights-granting. With respect, this is a false distinction in legal practice. For example, which was the Morgentaler case? Section 7 by its language does not grant women a right to abortion. But, by interpretation, section 7 was strong enough to invalidate the procedures for granting access to it as impermissibly restrictive. Very few constitutional rights are so obvious as to be granted by self-execution. Those cases rarely go to court, in fact, but women in contested situations get rights by interpretation or we do not get them at all. To observe that the Meech Lake accord is only a matter of weight is also similarly unhelpful. In the legal arena, interpretation is everything and, in interpretation, weight is all.

After being told that it is all interpretative, as if that makes women's disquiet trivial, then the most basic canon of interpretation does not even seem to be mentioned. That is to say, *exclusio unius*, that which is not mentioned is excluded.



Now consider concretely the situation of women, the possibilities of the Charter of Rights and Freedoms correctly interpreted, and what it could do for addressing that situation. Women have historically been second-class citizens in Canada as well as elsewhere with indices of disadvantage including unequal pay, allocation to disrespected work and demeaned physical characteristics. Women have been targeted for rape, domestic battery, sexual abuse as children and systematic sexual harassment. Women have been depersonalized, used in denigrating entertainment and forced into prostitution. These abuses have occurred in a historical context characterized by disenfranchisement, exclusion from public life, preclusion from property ownership, sex-based poverty, forced maternity, definition as sexual objects, deprivation of reproductive control and devaluation of women's contributions in all spheres of social life which continues to the present day.

Constitutions are both statements of belief and vehicles for actualizing those beliefs. They are aspirational as well as declarative and admonitory. In the face of this overwhelming social reality of sex inequality, the charter's equality guarantees are clearly goal-oriented and aspirational. They do not merely or simply codify or recognize an existing state of affairs. It then becomes a matter of interpretation whether the charter will treat equality as a positive goal needing to be affirmed, extended and worked towards to be realized in a way that would, say, support positive legislation even against conflicting rights, or whether equality will be treated in essentially negative terms, the state needing only to keep out of the social sphere and itself not moving to institutionalize inequality in order for charter-based equality to be considered achieved.

Perhaps the deepest cause for concern then is on the effect that the accord would have on the social process of constitution-building, a process which affects the relationship between the charter's political culture and its actual delivery of promised rights. In addition to being a species of law, the accord works politically. It works to set priorities and agendas, to affect resource allocations and to provide an interpretative understanding of the place of its values across the society. The accord, as a species of constitutional law, as a document, is also then a political act. It enters into the atmosphere that surrounds the seriousness of commitment to equality rights on a day-to-day level. That is the level on which a constitutional right either becomes meaningful or it dies as a piece of paper.

On this level, a constitution affects perceptions, actions and outcomes all the way from family court and rape trials to human rights adjudications. It shapes women's fortunes in the boardroom and at the bargaining table, in the home and on the street, in places where the charter is invoked and also in place where, formally speaking, it would seldom appropriately be raised. A political act like the Meech Lake accord either supports or detracts from a climate of concern in a way that affects the results of particular cases. It shifts the ground beneath legal arguments. It determines those things that become persuasive. In other words, it is part of what gives life to law.

On this level, constitutional process begins as politics, but it ends as law. This is what Quebec wanted. It is why it wanted what it wanted and it is what it got in the accord. It is on this level also that multicultural groups and aboriginal peoples were regarded as needing reassurance and they got it, and appropriately so. But it is also the level on which the equality rights of women were neglected. The place of sex equality as a fundamental commitment of the society, on this level, is as much constituted by documents like this as it is reflected in them.

Most broadly then, by choosing to reaffirm some interests and not to include gender and not to include other equality rights that are crucial to all women and to all citizens, the accord makes some rights structural to Canadian federalism in a way that excludes gender and it reduces the place of all equality rights from having a comparable place. It says simply that equality is not fundamental.

The record for women under the US Constitution makes all too clear that neglecting to mention women's rights at constitutive moments like this one is predictably not gender neutral in its effects, particularly under conditions, like women's situation, that require active change in the status quo in order for equality to exist. Facial gender neutrality in a non-gender-neutral world does not even guarantee gender neutrality, far less actual sex equality.

I think that the damage done to women's rights in Canada, which is of concern to all women worldwide, at this point in the process will be especially acute if no remedial action is taken. Given that the issue has been so forcibly raised, Meech lake fulfils the promise made in 1982 to Quebec to accommodate its aspirations; but at the same time and in a very separate way, it also breaks the promise made to all Canadian women to accommodate their aspirations within the Charter of Rights.

Lack of action to rectify this situation by including both section 15 and section 28 in the charter or by making clear that nothing in the charter is abrogated or taken away from by the accord squarely poses the question of whether sex equality is indeed basic to the Canadian polity, and it also seriously undermines the compact that the charter made between women and the Canadian state.

Mr. Chairman: Thank you very much for a presentation which frankly, even if we had all afternoon, I do not think we would probably be able to go through all of the various points and issues that I think would build off some of that discussion. That was a very full presentation, and I should express, on behalf of the committee, it is nice to hear someone who has sat down and actually read everything that has been going through this committee. That is a monumental task as well. We do appreciate the perspective on this and we will jump into questions now.

Mr. Breaugh: It was bound to happen; I think I have finally met a good lawyer. When I go to jail, you are going to get a call.

You are basically making the argument that there is nothing that can be done short of amending this accord to put in place something which establishes--I guess I would categorize it as saying it establishes--the supremacy of the charter. Is that the gist of the argument?

Dr. MacKinnon: That is the argument in its strongest form. You have, of course, heard other good lawyers before this committee who have suggested other possibilities. The possibility of a reference was raised, which would clarify these matters. I am not informed as to whether that is practical, given your timetable and the apparent reluctance of Ian Scott to proceed with it.

There are then, of course, the clearest possibilities of, yes, actually amending it. If I may say, it is my view that that is your responsibility. In the words of Mr. Peterson, it seemed that he did contemplate amendment as at least a possibility. He said, and I believe it is a good paraphrase if not a quote, "If it needs to be changed, yes, you can change it." Of course,



everyone knows both the politics of that and the tediousness of it.

I did actually have one sort of slight thought in addition to those. It may be somewhat fanciful. It is clearly a political thought. I would not put any legal weight on it, but it might in fact enter into the legal process in some way, and that is whether it might be possible to build in your desired interpretation of this accord into, and as a contingency for, your vote passing it, in such a way that if your interpretation were abrogated by a court, it would be clear that the approval of the accord was then rescinded.

1440

In other words, let us say you were to say, "All right; this is our interpretation of this," and write your interpretation out in full: "It shall not be interpreted in any way to abrogate from any of the rights under the Charter of Rights. For example...." It would be preferable to do that by amendment, clearly, but were you to feel that that was an impossibility, to do that as an interpretation and say, "It is the will of this Parliament and its understanding that only to the extent that this is not interpreted to take away from those rights do we pass it, and the moment at which it is, our vote for it will be regarded as rescinded," it would, shall I say, place any court that was looking to that possibility in the position of facing what would amount to a constitutional crisis, which you would have by design placed them in, and a bind you would have placed them in, to get your concerns before that court each time it was considering that interpretation.

I would not give that possibility any legal weight, but as I was thinking how you could build your interpretation into your vote other than by amending, which is preferable, that was the only thing I could think of.

Mr. Breaugh: Geez, I am out of jail already. Let me run through the two or three options that have been put before us and test them with you, because I am interested in your legal opinion on what might work.

We have discussed, because it has been suggested to us from several sources now, a court reference. None of us has a good feel for precisely how that would be done, how quickly it could be done and, frankly, no one is stepping forward and saying, "Here's what it would look like and here's where it would go." That option, which was suggested to us very early on, has not been pursued. We would be on our own or we would have to trust Ian Scott to do it for us--

Interjections.

Mr. Breaugh: There is the one option. The second option appears to be the straightforward amendment which a number of people have now put to us as being the only way to go. The real difficulty with that is that it is the easiest thing in the world for me to do; as an opposition politician, I can put it on the table now, I have it, but it will not carry here and it will not carry upstairs and there are 11 other places where it would have to carry where there are all kinds of people who could jack that around until I am long in the ground, so what starts out as being a nice, neat piece of business never happens. That is precisely what happened at the federal joint committee. People said: "You want amendments? There they are." Boom. The amendment fails. "Fine. Let's go on with the accord." So we search for other options.

We have had presented to us this idea of a companion resolution which would be put to the legislatures at the same time as the accord but would

stand on its own. That is a very attractive proposition in terms of being politically something that could be done. It certainly gets us over the initial hurdle of not withholding our approval of the accord and at the same time forcing other assemblies right now to deal with our concerns.

Does it hold the same weight, though, in your view, as the amendment process, or is it just a good second option?

Dr. MacKinnon: Perhaps not being as informed as I would have to be of the technicalities of the relationship between the amendment process and companion resolutions, I would have to say that I would be suspicious if someone told me it necessarily would have comparable weight. I would need to be shown that it would. If you amend it, the thing itself then says what you want it to say. If you have a companion resolution, it would depend on how it was worded. If it said, "This companion resolution is the understanding of this assembly and the resolution to which it is a companion was passed only on condition that these things were also understood to be part of it," then it would have considerably more weight. As to your question "Would it have the same weight?" I do not see how it could, but it could be worded as to have a clear effect.

I guess I would say also to your point about the reference, if I recall your transcripts correctly, Professor Baines offered to help frame such a reference, and it would also seem to me that the simple question "Would the Meech Lake accord abrogate any charter-guaranteed rights?" is a question to which if we had an answer we would know a great deal more than we do now.

Mr. Breaugh: I was impressed with that, but having been in politics for a little while now, I am not stupid enough to be sitting down writing what that reference will look like and letting someone come along at a subsequent date and accuse me of being a really mean person, let alone a jerk, for excluding the specific words that have to be there. We have to see some consensus on what that reference would look like before it would be very palatable in political terms.

Dr. MacKinnon: Then of course I think you would want to consider including all the other questions that have been raised before this committee, such as the question of the Northwest Territories and the Yukon and the question of the Senate.

Mr. Breaugh: I will not pursue this much further, but the attractiveness of the companion resolution is that in the first place the concept was not suggested by anybody on that committee; it came from native people. A number of groups have come before us and said: "Yes, we like the wording of those companion resolutions to the point that we would support that as an approach to meeting our reservations about Meech Lake."

There we have a document and a technique that is proposed by one of the groups directly affected and it is now being endorsed by other groups. That is far different from any one of us writing a little resolution and saying, "Do you like this?" and six months later somebody saying, "Yes, but you didn't put in the word that I needed to make it meet all of my requirements."

That is the attraction of the companion resolutions, that in a sense we are able to take almost neutral wording that has some measure of support and test it among other groups to see whether they too find it meets their needs. We do not have such a set of words having to do with the court reference on the other matters.



Dr. MacKinnon: Right. I would think that it would be possible, in consultation with Canadian women lawyers and Canadian women's groups, to develop a position on that, either that this was something they wished to pursue and forward or, if it were pursued and forwarded, that this is how they would like to have it drafted.

Mr. Breaugh: It would certainly be of great assistance to those of us who at least want to explore that idea.

Dr. MacKinnon: As for my particular role in it, I cannot represent to you what their views might be on either whether that strategy would be acceptable or whether any particular wording would be acceptable. I would think, however, that it would be only marginally acceptable as a fallback or second-level position to an actual amendment. In other words, women are very sensitive to second-class ways of guaranteeing rights.

Mr. Breaugh: I do not know why, but I understand it.

Dr. MacKinnon: Sometimes that is better than no guarantee of rights, but it still is not the same as being fully represented in the document that represents those rights.

Mr. Breaugh: Thank you.

Mr. Eves: Like my colleague Mr. Breaugh, I am wrestling with the way to do it. I know the way I would do it. As I said this morning to the Ad Hoc Committee of Women on the Constitution (Ontario), personally I think its suggestion with respect to section 16 is the only way to go. That is the only way you are going to resolve the issue and take a very ambiguous section of the accord and make it crystal-clear.

Failing that, though, and dealing with the political realities that my colleague Mr. Breaugh has enunciated, I hope we are wrong. Some of us on this side of the committee are perhaps politically naïve enough to believe that some government members actually will act according to their own consciences and not follow the dictates of their party or of their Premier when this matter comes to a vote.

However, if that does not carry the day, I see second-rate or third-rate solutions to this problem. A court reference is one way we can at least find out what the Ontario Court of Appeal and perhaps ultimately the Supreme Court of Canada think of section 16 as to whether rights under the charter are derogated or abrogated or not.

The idea of companion resolutions, as Mr. Breaugh has indicated, is one that was put forward to this committee several weeks ago by some aboriginal groups who have accepted their lot in life. They have accepted political reality in their minds. They are not getting anything right now, and the Meech Lake accord is not going to be amended to include their problems. So as far as they are concerned, a second-rate or third-rate solution--better than nothing--would be a companion resolution, which at least would put their agenda on the table.

You may or may not be aware that the next constitutional round includes such highly important matters as Senate reform and fisheries but not the rights of aboriginal people in Canada. There are other issues, and you have alluded to some of them, such as the rights of people living in the Northwest Territories and the Yukon and the right of individuals from those areas of Canada to be nominated for the Supreme Court of Canada or the Senate.

1450

The attractiveness of a companion resolution is that it may allow Premier Peterson and others to swallow their political pride, yet still keep their deal, if you will, to not change a comma in the Meech Lake accord. I suppose it also has the attractiveness in that you can put forward many companion resolutions. Some of them may succeed and some may fail.

The problem with it, though, as I see it, and I am far from being an expert on such matters, is that a companion resolution is really nothing more than a future amendment to the Meech Lake accord or to the Constitution of Canada, and eventually you are going to have to get the approval of all 10 provinces and their legislatures, and the federal government as well. I think it is just a way of fast-tracking a future amendment. I may be totally wrong, but that is my perception of what a companion resolution is.

Given those three opportunities, direct amendment, court reference and companion resolution, what would be your hierarchy of preference?

Dr. MacKinnon: It seems to me that a court reference could be pursued in tandem with an attempted amendment, so those are not exclusive. If anything, it is the disability of the reference procedure that it would take time. But if we were also pursuing amendment accordingly to satisfy the suspicions that we think we already have, while trying to get clarification on those suspicions from the court, the amendment process could be carried out.

I think to put the issue as whether one will take something or will take nothing, and also to suggest that what the concurrent resolutions would provide is an agenda for the future, places it in a position with which women are extremely familiar historically, that is to say: "Other things are more important than you are. Be patient. We will get to you eventually, some time."

Mr. Eves: Maybe next century.

Dr. MacKinnon: Right. It is the time at which one is actually doing this process, which is what Canadian women, of course, learned and did and acted on at the time when there were no adequate sex equality rights in the charter itself. It was then necessary, as some perceived, to go after the whole thing all over again and get it done when it is being done; do it right the first time.

In that perspective, being told to be patient, particularly when we think you could fix this, does not carry a lot of weight. I think people are not--at least my sense of women I have spoken with in Canada--are not terribly sanguine about the possibilities for equality yet again being placed on a middle tier, or back burner, or whatever it is. A reference would provide some clarification and seems a creative idea. Amending it, however, seems the right thing to do. It seems as though it is something that should be pursued as top priority because it is the right thing to do.

Mr. Cordiano: Certainly everyone understands the desire of various groups that have come before the committee to have greater assurance with respect to the Constitution. There is a higher level of certainty about what things mean, and I can appreciate that.

I would like to get from you your view about the perception or the perspective that has been put forward by some with regard to section 16 of the Meech Lake accord, namely, that section 16 refers back to two clauses in the



charter dealing with matters cultural and that they are put in there because section 2 of the charter, the "distinct society" clause, deals with the whole concept of Quebec as a distinct society, as a cultural entity within Canada. Do you accept that view or do you think that is a flimsy argument in the legal sense?

Dr. MacKinnon: I think it is not a flimsy argument, and it does seem to me that were I advising multicultural groups or aboriginal groups, I would urge that something like section 16, if not more, was certainly called for, given the necessity for something like section 2. The other possibility, however, would be that there were no section 16. However, I would say at this point, particularly at this point, given that it does seem to be called for by section 2 and that it is there, it would be an extremely bad move as an attempt to solve all these other group, as they are perceived, problems to simply get rid of that one too.

Mr. Cordiano: There are two views on section 16, the one I have just expressed and the other that some have put forward, that section 16 was added as a last-minute effort to placate, if you will, certain groups within our society, aboriginal peoples and ethnic groups, which have a major concern with respect to multiculturalism. They are the two prevailing views, but when you try to work in the whole question of equality rights, it brings it to another level.

The people who put forward the first view I spelled out would argue that there is no need to bring in those sections in the charter referring to equality rights because the charter provisions stand on their own and are strong enough, and that the charter stands on its own. That is the basic argument put forward. So you would accept that in fact section 16 needs to be there because it does deal with matters cultural and that to have greater certainty with respect to section 2 of Meech Lake, "distinct society," it is required?

Dr. MacKinnon: I would truly advise, as I said, those groups to seek that. I would advise them to demand it. They could not be adequately reassured without it. I would think their rights were threatened potentially without it, although that implies no concrete view on my part about how the distinct society itself might do so. I have no such view at all.

I would like to add that equality rights are often in conflict with what are perceived as necessary cultural values within many cultures. This is surely not specific again to the distinct society in any way; in fact, it is more likely to be specific to other cultural groups. So that to say equality is equality and these other things are matters cultural is to neglect the way in which equality rights do address matters cultural.

Mr. Cordiano: I did not want to leave you with that impression. Professor Baines put forward the notion that women as a group have a common culture that women can ascribe to; that in fact there is a culture surrounding women's beliefs and notions that prevails throughout history. That was her view. If you take that one step further, then you could say that women would be tied into sex at 16 if you think of it as matters cultural.

Dr. MacKinnon: Yes.

Mr. Cordiano: That is a plausible argument perhaps. I am not sure. Who knows? But Professor Baines certainly seems to think that you could ascribe a common culture to all women.

Dr. MacKinnon: Yes, and I have noticed your fascination with the argument throughout the transcripts.

Mr. Cordiano: Jeez, you have done your reading.

Dr. MacKinnon: That is what I thought you were thinking about.

Mr. Cordiano: I wanted to see if you agreed with Professor Baines's view that there is indeed a common culture that you can ascribe to women, because that is something quite different.

Dr. MacKinnon: If that were actually something one could establish in law, then that would mean there would be no need to add equality rights to section 16 by means of reassuring women of equality rights because our culture of equality would be something we could pursue under multicultural. That is what you have thought about, right?

Mr. Cordiano: It is very vague in my own mind with respect to that because, as you say, it has never been brought forward as a legal argument.

1500

Dr. MacKinnon: Yes. I also recall that Mary Eberts suggested that she might find a way to use such an argument were the correct conditions available. I do not disagree with that. I do think that inequality is part of men's culture. It is a part of the culture men have shared cross-culturally.

Mr. Cordiano: Not all men.

Dr. MacKinnon: No, but I am saying as a cultural characteristic, sir, which does not necessarily address the efforts of individual men or women to contest that. For example, the exclusion of women from public life can remain a general fact in spite of the presence here of women members of Parliament. What I think is that women have also been deprived of a culture.

There are things that one can attempt to do to rehabilitate that lack and that deprivation and that inequality by pointing out the positive side of what women have done, what women have accomplished. But I think that does not make up for what women could have done, could have accomplished, what women could say or become as individuals and as a collective culture were it not for inequality. So I would be very hesitant to rely on what women have been able to produce as a culture under conditions of inequality as a basis for fighting against the very inequality that has created the limits and bounds of that culture.

Miss Roberts: This is just a comment, and I apologize for not being able to hear the first part of your presentation. You are very good at putting across your point. If Mr. Breaugh ever compliments a lawyer, he must really mean it.

Mr. Eves: Either that or he is very tired.

Miss Roberts: That is right.

Mr. Breaugh: That is not on the record.

Miss Roberts: Or else it is getting late in March.

Dr. MacKinnon: Perhaps he also has a very well-founded scepticism in lawyers.



Miss Roberts: That could be very true.

It would appear to me that equality rights, legal rights, all the charter rights that are there are going to be attacked from time to time, each time we look at the Constitution. That is something that Meech Lake has certainly pointed out very clearly.

Dr. MacKinnon: Yes.

Miss Roberts: We have to be--and I use that in the sense that all people have to be--on guard with respect to that particular attack. Your coming here today and expressing your point of view is very helpful for us to realize how that attack is occurring, but how do we deal with that attack? You will note that from time to time, in the transcripts as well, I have dealt with this process. How do we deal with that attack?

Meech Lake does not occur--take that scenario--and there is going to be another presentation, and your points of view and your expertise in the area is required to help us, as legislators, deal with the problem. Do you have any wisdom with which you can help us with respect to that? How do we tap your expertise without being here at this particular time?

Dr. MacKinnon: Were that to occur, it would be rather important to regard the existing provisions of Meech Lake as themselves essential to whatever the next document were to be. In other words, so that one would not in fact put the whole thing back to where Quebec did not know if there was going to be a "distinct society" clause. In other words, it seems to me the things that were in there would have to begin as non-negotiable. The question was only, what could be added? At least that is how it would seem to me. It just does not seem acceptable to once more subject those clauses that are acceptable and necessary to Quebec to further negotiation and possible political compromise. That is just the first thing that occurs to me off the top of my head, not having considered this specific possibility.

In answer to your question about input and expertise, Canadian women are better organized both on the legal level and on the social and political level in terms of having clearly organized groups that expressly voice women's concerns in ways that are really rather difficult not to hear if the process is set up merely to make them accessible. In other words, the very process through which, for example, Quebec was represented in the Meech Lake situation, the process through which multicultural and aboriginal rights were brought to the attention, however inadequately, of the drafters, might seem to me to be the kind of process that should be made available to all groups that wish to have input into the further changes that would then be added to that basic document.

I may not be expressly addressing what your underlying concern was there.

Miss Roberts: Your comments are very helpful, in particular your first comment with respect to what should occur, maybe, in the next draft. Thank you.

Mr. Chairman: There is one point I would like to underline, which flows from Mr. Eves's earlier comment. I feel safe in making it, because while I am there, I am also here on this side, so I guess I have a foot on both sides of the--

Mr. Breaugh: A classic Liberal position.

Mr. Chairman: It is the yin and the yang.

Mr. Morin: But it works.

Mr. Eves: It is fine if you have long legs.

Mr. Chairman: It seems to me we have had the question today and on several occasions as we struggle with various alternatives in moving forward. It is important to make the point to you and in fact to some others who were here this morning that, clearly and understandably, we recognize that the option the women's groups which have been before us would like to see is an amendment to the accord.

Whatever our problems might be in dealing with the Meech Lake accord, whether as government members or as opposition members, what we have tried to say is that as we come at this issue as a committee, we have to still try to, in a sense, eliminate those other background noises and at least in our own minds determine: Do we think this is a bad accord, not just because of the reasons you have raised, but do we think it is bad? If not, do we think it is all great? Are there parts we do not like? How bad are those? How should we go about it?

There are a whole series of questions, it seems to me, that I, as a legislator, have to wrestle and struggle with. Obviously, we are dealing in a broader political process, and a lot of things have been said outside this room which at some point in this whole business we are going to have to come to grips with. I think as we have talked, particularly with women's groups and individuals, as we said this morning, some very clear and specific recommendations have come forward. It is perhaps quite understandable that a committee would be looking at or trying to search for what the options are, what the alternatives are, in dealing with this.

I think for us in a sense to be trying to get you to say, "I would give this nine out of 10 and this seven out of 10"--clearly, for the women's organizations and groups that have been before us the preference by far is that if this is what in fact is meant, then let us do it and get the whole thing over with. I guess in the whole balancing act of all the other things that are surrounding this issue, at some point we will have to make a decision and try to go with that. I just wanted to be clear that that message has come through. However we deal with that in the end, it is clear what the first priority is. I think you have made that clear and I think the groups this morning and others have made that clear.

That is just by way of a preamble or comment on everything that has been said. I would like to thank you very much on behalf of the committee for coming in this afternoon.

Dr. MacKinnon: Thank you. I would just like to say to your last remarks that I hope I made as clear as I wished to that all equality rights are crucial to the advancement of women. In other words, one can say that section 28 should be added as parallel to 25 and 27 under section 16. I think, however, if one has at heart the interests, not only of all people but more particularly of all women, that the equality rights included in section 15 having to do with race, nation, religion, mental and physical disability and so on are also crucial to women getting out from under the situation we are in.



1510

Mr. Chairman: I think you made that quite clear but I appreciate the underlining. Again, thank you very much for joining us this afternoon.

Dr. MacKinnon: Thank you very much.

Mr. Chairman: I would like next to call upon the representatives of the Canadian Association of Law Teachers, Professor Jacob Ziegel, the co-chair of the committee on judicial appointments, and Professor Gerald Gall, who is also co-chair of the committee on judicial appointments. Gentlemen, we welcome you to the committee this afternoon and appreciate that you could be here. We recognize that at least one of you has come from a long way away to be here with us. I will simply turn the floor over to you to take us through your presentation and we will follow it up with questions.

CANADIAN ASSOCIATION OF LAW TEACHERS,  
SPECIAL COMMITTEE ON JUDICIAL APPOINTMENTS

Mr. Ziegel: Thank you very much. My name is Jacob Ziegel. I am of the faculty of law and co-chair of the special committee on judicial appointments of the Canadian Association of Law Teachers. My colleague, Professor Gall, is a fellow chairperson, and as you have already intimated, he is a member of the faculty of law at the University of Alberta.

We are grateful for this opportunity to appear before the committee today. It is not the first time we have had occasion to make submissions on a particular aspect of the Meech Lake accord. We appeared last August before the federal committee, but we deem it important that our views also be expressed before this committee, and so far as appropriate, before other provincial committees with similar terms of reference.

As our brief makes clear, it is solely concerned with those aspects of the Meech Lake accord that deal with future appointments to the Supreme Court of Canada. Our committee's terms of reference do not extend to any other aspect of the Meech Lake accord and we offer no opinion about the desirability one way or the other. We do, however, have some very keen views about those provisions in the accord dealing with future judicial appointments to the Supreme Court.

As I am sure the members of the committee are aware, there has long been concern among the provinces that under the existing Constitution Act there is no participation by the provinces in appointments to the Supreme Court of Canada. The Meech Lake accord attempts to address that long-standing concern by giving the provinces a voice in the future selection of Supreme Court judges.

Our committee has absolutely no quarrel with the concept of provincial participation in these judicial appointments. Quite the contrary; we think it is right and proper. We do, however, have strong concerns about the mechanisms, or perhaps the lack of mechanisms, envisaged under the Meech Lake accord for expressing this provincial participation, and generally with respect to the lack of sensitivity in the Meech Lake accord about past concerns about the method of judicial selection in Canada at all levels.

It was those concerns that led to the appointment of our committee in 1985. Members of the committee may recall that prior to and during the last federal election, much concern was expressed about the role of patronage, both

in appointments to the federal bench and in other patronage appointments to other offices made by the then government. As a result, the Canadian Association of Law Teachers decided to establish our committee to review the general method of appointment of judges in Canada and to make appropriate recommendations.

By happy coincidence, the initiative of our association coincided with a similar initiative taken by the Canadian Bar Association, thus reflecting the concerns of two major legal bodies in this country about the method of appointment of judges. Both committees reported in 1985. Our own committee reported at the end of May. The Canadian Bar Association committee reported in August. They both came to strikingly similar, if not identical conclusions both as to the nature of the problems and the desirable solutions. Both committees found that there were systematic defects in the existing system of judicial appointments in that the role of patronage and political influence is much too large and the overriding goal was not designed to select a person solely on the strength of merit and aptitude.

It was with a view to correcting this very serious defect, one that has afflicted the Canadian polity almost since the beginning of Confederation, that both committees strongly recommended the establishment of what, in our report, is called judicial nominating councils and what the CBA report refers to as advisory committees. The purpose of both these bodies, as envisaged in both of these reports, is to have independent committees scrutinizing the prospective candidates, drawing up a list and then making appropriate recommendations, in this case to the federal government of Canada.

As members of the committee will appreciate, under the Canadian Constitution the federal government has exclusive responsibility for judicial appointments to all the higher provincial courts and to all the federal courts, including, of course, the Supreme Court of Canada. This means the federal government is currently responsible for the appointment of over 750 judges who exercise, both individually and collectively, an enormous power, one that reaches into every aspect, public and private, of the lives of Canadians and the life of Canada at large.

Our concern is that the Meech Lake accord does not adequately, or even at all, reflect the concerns in either of the two reports about the method of selecting judges. It merely requires that the federal government, in making future appointments to the Supreme Court, must select a nominee from a name put forward by the government of the province where the prospective candidate resides. It gives no clue how the provincial government is to go about making its nomination. It provides no direction, no guidance, no principles and no criteria how the federal government is to be guided in responding to the provincial nominations.

Our concern is that we may have more of the same. It may be that both levels of government will be guided by the highest possible motives of the good of the country and wholly exclude political and other irrelevant factors. On the other hand, it is just as possible that one or other level of government will be guided by narrow, partisan considerations in either making its nomination for appointments, or in the case of the federal government, deciding who is to be actually appointed.

This is not idle speculation. There is much documentation about appointments at all levels of courts in Canada, including the Supreme Court of Canada. There is overwhelming evidence that in the past narrow partisan considerations have played a powerful, if not a dominant role in the selection



of individuals. It is precisely those narrow partisan considerations that we are concerned about and that we wish to exclude in future appointments to the Supreme Court of Canada.

What we say in our brief is that there is a way out and it does not involve a formal amendment to the Meech Lake accord. The solution lies in the federal government publicly stating now that it accepts the recommendations of the Canadian Bar Association committee and of our own committee, and that it will proceed to establish these advisory committees or nominating councils at the several levels at which we have recommended they be established, so that in future the nominations of the particular provincial government and the actual appointments by the federal government will be based on recommendations made by impartial and highly qualified groups of individuals.

1520

We think this will ensure not only that the best qualified people will be appointed to the most important court in Canada, but also that the appointments will be seen to follow the path of utmost integrity and maximum objectivity.

That, putting it in a nutshell, is the thrust of the brief we have put before you today. My colleague, Professor Gall, would like to supplement my opening remarks with a few additional comments.

Mr. Gall: It is a pleasure to appear before you. As you know, I come from Alberta, which had no hearings, so I had to seek out a place where there were hearings. That is not quite true. I do have an affinity to Ontario. I was born here, grew up here and was educated here. In fact, I remain to this day a member of the bar of this province, so it is not really a foreign jurisdiction.

Mr. Chairman: Leaving your options open, as they say.

Mr. Gall: One could look at it that way.

I would like to supplement the remarks with a very brief comment. The Canadian Association of Law Teachers and the Canadian Bar Association have argued for a broad-based appointment process, a process which takes into account the Meech Lake provision that the provinces will be represented in the appointment process, but also takes into account that there will be a broader range of input in the appointment of judges to the Supreme Court of Canada, including that of the public. We prefer that system with respect to all judicial appointments, including the Supreme Court of Canada.

One of my concerns with the Meech Lake provision is that the provinces, in nominating candidates to the Supreme Court of Canada, will take into account somewhat parochial concerns in relation to their nominees. It is understandable that a given Premier will want a candidate on the Supreme Court who is viewed to be in the best interests of the province. And so he should. That is a basis upon which provincial premiers presumably make all of their decisions.

Having regard to federal-provincial disputes, obviously the provinces will want to nominate someone who will take a "provincial rights" point of view. There is nothing sinister about this. It is just a fact of life, the same as our present system, where it is possible for the federal government to nominate persons who are centralists.



However, the better system, we feel, is one employing broadly based advisory committees, with representation on the committees of various interests. It is somewhat ironic that after Meech Lake, if there are no changes in the accord, the provinces will now have a constitutionally entrenched role in the appointment of judges to our most important and truly national court, whereas the provinces will continue to have no constitutional role whatsoever with respect to the appointment of judges to their own superior courts.

The answer, it has been explained, is that maybe some people regard it as more important to appoint the league commissioner than the umpires, but in any event, the provinces will have no role with respect to the appointment of judges in their own courts.

I have a couple of other remarks but perhaps we can spend the time more profitably in answering questions.

Mr. Chairman: Thank you very much for zeroing in on a particular part of the accord. You might be interested to know that we had Professor Peter Russell who spoke to this issue in his presentation and we had another organization which specifically addressed the question of the Supreme Court and suggested another, not all that dissimilar, approach to this as well.

We have recalled that earlier this year the Attorney General (Mr. Scott) had suggested some opening up of the process through which provincial court judges were appointed. I think this is very much an issue whose time has come. It is something we should try to wrap our brains around and try to come up with some proposals. I think this is very useful.

I was not aware of a lot of the background information that is here.

Mr. Breaugh: We have discussed this briefly on one or two other occasions. A couple of points perhaps will suffice. One, we are a little uncomfortable, but not with the notion that this kind of a concept be put in place; I think there is general agreement, by me anyway, that it would be a really good idea.

The missing piece I struggle with a bit is, then what does the federal government do with these nominations? Is it appropriate to bring into Canadian parliamentary procedure some form of--if it is not really an approval process. I suppose we would design some kind of a polite interview process. After this august group put forward someone's name in nomination and the federal government decided to proceed with it, what then? Do we send these people off to a parliamentary committee that interviews them?

Just to give you a little bit of my personal feeling on the matter, up until now, we have kept our hands off the judiciary in a very real, strong sense. People who were ministers here got bounced out of the cabinet for daring to telephone a judge. But if the Supreme Court of Canada is to become more and more a player in the lives of Canadians and if it does not just adjudicate a case heard before it but its decisions have ramifications right across the country the next day, and that now is the case, then it does become more and more important that we have some understanding of who these people are, what their backgrounds are, what their feelings are, and to be sensitive in a politically appropriate way to what their point of view really is.

Although you are not asking them to give out what their decisions will be, you are asking them to give some knowledge of who they are. Right now, I

think it is not unfair to say that the members of the Supreme Court are not known entities to the Canadian people. They do not know who they are.

How do you feel about some kind of process? I noticed that both you and the bar association stepped back from that just a touch. Would you step into it just a touch?

**Mr. Ziegel:** Sure, I would be glad to. Our committee did not address its mind to a particular parliamentary process to approve the appointment of judges to the Supreme Court. We did discuss briefly the general question of whether there should be a parliamentary screening process for federally appointed judges in general. Our committee generally did not endorse it because it thought it would politicize the process too much. It would be very divisive. It would be uncomfortable for the judges. It would introduce an entirely novel mechanism into the appointment of judges following the Anglo-Canadian tradition.

Speaking to the issue of Supreme Court appointments specifically, and I can only speak for myself, I personally would not be averse to having something similar to a US Senate ratification type of process. I share your concerns that the public at large knows nothing about nominees to the Supreme Court. They are entitled to know. The people's representatives in Parliament should have an opportunity in an appropriately decorous and mature fashion. It is not necessarily a reflection on the integrity of the federal government that puts forward the recommendations. It is simply, as you very properly put it, a reflection of the fact that the Supreme Court today is a major participant in the government of the country, and as is true of any major participant, there ought to be a high degree of visibility and a high degree of accountability.

If you would allow me to make this additional point, I do not think the recommendations of these two committees really bear on your concerns. I think those are severable concerns, because whether you have recommendatory committees, as recommended in the two reports, or whether you have the federal government proceeding unilaterally, which is presently the case, I think the problem would still arise of whether there should be a further screening process before the appointments are ultimately made.

The basis of the concern in the two reports is that up to this very moment the federal government has no accountability. It is not the practice in the federal Parliament for the government to be cross-examined about the appointments it has made. It is generally said that it would be improper. In any event, it is not the practice to do so. The federal government is not accountable and does not account. That is what we are deeply concerned about because of the overwhelming evidence that in making past appointments, the federal government often has taken partisan factors into consideration rather than the factors of merit and integrity.

1530

**Mr. Gall:** May I add to those remarks? I certainly appreciate the introduction to your question because the previous witness, and I am sure many witnesses, addressed uncertainties: What will "distinct society" mean? What will be the effect of section 16? Who is going to decide those issues? If you have a reference, who is going to decide the reference? The Supreme Court of Canada ultimately is the institution in society that is going to resolve these issues.



Think back to seven years ago. When the charter came into effect, who would have thought that "security of the person" in section 7 meant no abortions? It is not predictable how the Supreme Court will decide it. Ultimately, they will make the decisions. Short of ironclad amendments, they will make the decisions, so it is important to focus on that institution. It should not get lost in the Meech Lake process because ultimately it will make the decision.

You are right. That is one of the significances of the Morgentaler decision, and the Big M Drug Mart; the Lord's Day observance. People are saying, "Who are these nine unknown, unelected people in Ottawa, whose names I don't know, who are affecting my personal life and who are affecting my value system?" The cases are as important for abortion as they are institutionally for the realization that these men and women in Ottawa are affecting the population at the grass-roots level.

Having said that, I agree with your introductory remarks. I think Professor Ziegel is correct. Our committee did not address the question of a confirmation hearing. It addressed the question of refining the appointment process up to the confirmation point. I am not sure I would like to see in Canada a Bork-Ginsburg-type circus as we saw in the United States, but that is just a personal opinion. Our committee did not address that; we addressed the question of refining the appointment process up to the issue of confirmation. I guess you have to walk before you can run in the sense that if we can get that much done, we will have improved the system significantly.

Mr. Breaugh: I think the problem we all struggle with is that I would advocate we do not want to put someone on the Supreme Court of Canada and then yank him out of there because he is getting real dumb. We always want to maintain the position, I suppose, that anyone who might be nominated is eminently qualified and will be eminently fair in his decisions.

The problem is that as their decisions become more and more integrated into everyone's lives and the Canadian political process, it becomes absolutely crucial that we at least have some understanding of who these people are and what their backgrounds might be. If we are going to put them on the Supreme Court for life, so to speak, which for all intents and purposes we do, and we have no means of recall or at least the recall process is very difficult, it seems to me that is the last chance anybody has even to ask politely for some measure of accountability.

Let me just pursue one other little point with you. You have enclosed as an exhibit with your presentation today a copy of a letter from the Premier (Mr. Peterson). I must say I read it. I have received similar letters myself. It is kind of like saying, "Take the next bus." I read both these submissions. I see them being as right in line with the accord. I see them as embellishing one of the major recommendations of the accord; that is to say, if the provincial governments are to do the nominating of judges for the Supreme Court, the next question is, how we do go about doing that nominating? It seems to me you would turn to wise folks in the land and seek their counsel on what kind of process you would put in place.

It seems to me that the Attorney General (Mr. Scott), who is still a legally practising lawyer in Ontario, put forward much the same kind of idea not too long ago, so I was a little taken aback that the Premier of Ontario decides this is a revolutionary thought that cannot be considered while this thing is under way. Have you had any further correspondence from him or any



rational explanation why he is so paranoid about thinking about your report? It is not exactly a revolutionary document.

Mr. Ziegel: I am glad you recognize that. No, I have not had any further correspondence with the Premier. We did meet with the Attorney General a year and a half ago to discuss our initial recommendations, and of course, we welcome the Attorney General's indication that the provincial government intends to broaden the base of future selection and to establish a committee somewhat along the lines we recommend, though somewhat differently structured.

I want to be fair to Mr. Peterson. I did not read his letter as repudiating our recommendations. I think what he was trying to do is protect the Meech Lake accord while at the same time expressing some sympathy for our views, but saying those views could be considered at a future meeting of the first ministers. Our point is we should not have to wait for future meetings of first ministers. Our recommendations can be implemented now and can be implemented without having to change the Meech Lake accord.

We have real concerns that unless the federal government commits itself to implementing the recommendations in the two reports before the Meech Lake accord becomes the law of the land, we may have to wait yet another half century before anything is done. Astonishing as it may seem, it is now almost two years since the two reports were published, yet to this day the federal government has given no public indication of its position. We have had several false alarms. The first Minister of Justice promised that the federal government would unveil its position two years ago. The two years passed and nothing happened.

We met Mr. Hnatyshyn just over a year ago. He was not willing to give any indication when the federal government is likely to state its position. I find this remarkable. Here are two very important reports bearing on a critical aspect of federal and provincial government in Canada, and yet the federal government is not even willing to say what it feels. To me, this suggests that it either thinks this subject is too politically sensitive or it is not willing to say publicly that it rejects the recommendations for whatever reason it may have.

It is precisely this long delay and the expression of federal government opinion causes us concerns and strengthens our view that it is important that the federal government be pressured to agree to the implementation of the two committees' recommendations before the Meech Lake accord becomes the law of the land.

Mr. Breaugh: Although, to be fair, they have been very busy keeping the cabinet out of jail, so they may not have had time to get to the appointment of judges to the Supreme Court of Canada. In case you have any doubts, this is a standard "get lost" letter from the Premier's office. I have received many of them and I can assure you that is what it means.

Interjections.

Mr. Cordiano: If it is addressed to you, that is what it means.

Mr. Breaugh: When it is addressed to me it says, "Get lost, jerk."

Mr. Chairman: We have discussed a number of times the question of whether Mr. Breaugh should be elevated to the bench and I think, after his interpretation of the Premier's letter, we understand at least not at this

time. I think there are other interpretations of the letter and Professor Ziegel's is undoubtedly closer to the truth. Certainly, this committee looks at that approach as one that really merits a lot of exploration.

1540

Miss Roberts: Perhaps I might, gentlemen, speak to you briefly. Besides Mr. Breaugh, I will be another person whose name will not be recommended immediately.

Mr. Chairman: When?

Miss Roberts: Immediately; if ever, I hope. Are you saying that the provincial governments should all have the same process, exactly the same process, so that they can bring forward--I have not had a chance to review all your recommendations in great detail. Are you saying it is important that process be entrenched in the accord along with the suggestion that the list should be there by provincial appointment? Should we all have the same process?

Mr. Ziegel: No, I think you slightly misunderstood our brief, Miss Roberts. What our original report recommends is a series of judicial nominating councils. One would be for nominations to the superior courts of the provinces. In that case, each province would have its own nominating council, but only for federal appointments to the higher courts of that province. There would be a second judicial nominating council for appointments to the federal courts of Canada other than the Supreme Court of Canada. Appreciate that there are a range of courts now at the federal level. Finally, there would be a third nominating council to fill vacancies on the Supreme Court of Canada.

Since it is envisaged under the Meech Lake accord that the federal government's choice will be limited to nominations arising from the provincial government of that particular province, what we are saying in the case of vacancies on the Supreme Court of Canada is that we would have a judicial nominating council which would encompass representatives from various groups, from the federal government, the provincial governments, law societies, as well as members of the public at large.

They would make recommendations. Because their recommendations would be based on the views of a broadly based constituency, the federal government should not have much difficulty in selecting one of the recommended names where the recommendations include more than one name.

Miss Roberts: I understand all that. What I am asking you is, do you believe it should be the same in each province, that final council, that it should be exactly the same in each province, that there is no reason for there to be any difference and that it is important it be the same; in fact, so important--

Mr. Ziegel: No. Do not forget, when we made our initial recommendations in 1985, there was no Meech Lake accord, and we did not have to address ourselves to the slight complication introduced by the Meech Lake accord. Our overriding concern, as I say, was to strive for integrity in the appointment process and to ensure also that recommendations be broadly based. Within those broad parameters, I think there is lots of room for flexibility. If, for example, Ian Scott believes there should be a larger number of lay



persons on the various committees, that is fine with us; we have absolutely no difficulty with that.

I think what you have to bear in mind--perhaps this is not sufficiently emphasized in our brief--is that when judges on the Supreme Court reach a decision, it does not affect just one province and the federal government; in almost every case, it affects every province and the whole of Canada. That is why it is important, therefore, that the selection process of every judge of the Supreme Court of Canada be as broadly based as possible.

If I may say so, I think that is one of the serious weaknesses in giving Quebec an entrenched right in appointing three judges. The assumption appears to be that those three judges will give a particular Quebec perspective and Quebec has primary interest in matters affecting Quebec. That would be fine if those three Quebec-recommended judges were only concerned with Quebec issues, but they are not; 95 per cent of their time will be concerned with interpretation of federal issues, of charter issues and questions involving other provinces.

That is why we feel it is terribly important that a nominating council concerned with appointments to the Supreme Court of Canada be broadly based so that a national perspective can be brought to bear on the filling of the vacancies, not merely the perspective of one particular territory or region, however valuable its perspective is.

Miss Roberts: My only other comment is that I think most people who apply for judgeships now would be somewhat terrified by that particular prospect, because they are not elected people. They have never been elected people and they have never really been scrutinized by a committee of people who are going to be asking them questions.

What is the use of having a broadly based--I do not want to get into any argument, but you understand that in our judicial system, the lawyers who are out there are going to have to be aware of that and be prepared to deal with that type of scrutiny as well, which I think is excellent. I am not saying it is wrong. I am just saying you are going to have to prepare our legal community for that, and also for some type of confirmation, whether it is in front of that council or in front of someone else. That is going to be a point as well: The legal community will be under more scrutiny than it has been before.

Mr. Gall: I think you are correct. There is really nothing wrong with that.

Miss Roberts: No, I am not saying there is.

Mr. Gall: Now we have an entirely secretive process. No one knows how judges are selected. There is no accountability once they are selected.

Mr. Ziegel: Let me add, Miss Roberts, that there are ample precedents. We were not innovating. Both Quebec and British Columbia have had various types of nominating committees for a good many years, British Columbia the longer of the two. British Columbia has a judicial council which is exclusively responsible for recommending names to the provincial government. The system has worked extremely well. They interview every candidate. It has not caused any difficulties. Quebec not only interviews every candidate; it openly advertises that there is a vacancy and invites applications.



Every university professor is scrutinized by some sort of committee before he is appointed. Every president of a university and every senior government official is scrutinized by someone. I fail to see why a prospective judicial appointee should be concerned or apprehensive about submitting himself or herself to a process that is really pervasive in modern society.

Mr. Offer: My supplementary, almost a question but it is just a supplementary: I am still trying to get an understanding as to the nominating council with respect to the Supreme Court of Canada. I just want to clarify that you seem to be suggesting that, yes, each province will have some sort of organization, some sort of council in place, but the council itself may be different.

Mr. Gall: For the Supreme Court of Canada, our particular recommendation is one council consisting of the Chief Justice of Canada, a nominee of the Canadian Judicial Council, a nominee of the federal Minister of Justice, a nominee of the Attorney General or Attorneys General of the province or provinces from which the candidate is likely to be selected, because there are certain conventions as to where judges come from, two members of the bar to be selected on the same basis as a bar member of the federal judicial lobbying council and a member of the public to be nominated by the other members.

Mr. Offer: You have this national type of nominating council, but who sits in some of the chairs of the council would be changed depending upon where the judge is chosen from.

Mr. Gall: Precisely.

Mr. Offer: Having said that, the list from the province would go to this council and it would scrutinize it and go back to the province for submission to the federal government. How would that work? Is it the council that makes the final determination or does the council just somewhat looks over the particular person and send a report in essence back to the province saying, "This person is okay," and he gets a little stamp of approval, so to speak. I am just wondering, who makes the actual appointment?

Mr. Ziegel: The actual appointment obviously would be made by the federal government because that is mandated under our Constitution. Your question is perfectly legitimate. Remember, our report was issued before the Meech Lake accord and therefore did not take into consideration the additional complication introduced by the Meech Lake accord.

In terms of your actual question, yes, there are alternatives. It could be that the provincial government will express so much confidence in this national nominating council that it will say, "So long as we are represented through our Attorney General, through our bar, through perhaps a public representative, we have so much confidence in the integrity and adequacy of this body that we will be very happy to accept its recommendations and, in turn, put them forward to the federal government." If this is regarded as perhaps a little premature or a little unduly optimistic, then it will be open for a provincial government to say no in addition to the federal body.

1550

We feel we would like to establish a body of our own which, in a sense, would parallel the federal body. My own preference would be to have one body to screen names for appointments to the Supreme Court rather than a

multiplicity of bodies, because it would emphasize the national role of the Supreme Court rather than a provincial or regional role.

Mr. Offer: I have a just a short question. I think the confusion with respect to the Premier's letter was that it was read as if this type of national nominating council would be almost an amendment to the accord.

Mr. Ziegel: That is not correct.

Mr. Offer: I think that is how it might have been misunderstood, as opposed to your saying, "Keep the accord intact, but if we could possibly have an understanding that this is something which might be approached in order to carry out the section, that would suffice."

Mr. Gall: It could be very complementary to the accord. It could almost have a lock-and-key arrangement with the accord. It is possible.

Miss Roberts: Just a point of clarification, because I am not knowledgeable in the law in any way, shape or form. Is it your opinion that Meech Lake as it stands right now in respect to these appointments suggests that we are moving towards the circus that goes on with the Supreme Court appointments in the United States? Did you suggest that?

Mr. Gall: No.

Miss Roberts: Do you think that?

Mr. Ziegel: No, not at all. As I say, we never even considered that our nominating councils would hold public hearings or ventilate names of candidates in public. As I mentioned earlier in response to Miss Roberts's question, we have precedents in Canada, Quebec and British Columbia. There are 30-odd jurisdictions in the United States that operate what we call a Missouri-type plan, which also involves nominating councils. Those councils all operate in camera, so it is a long cry from the Senate confirmation proceedings in the United States.

Let me add that I do not disparage the American proceedings. I do not regard it as a circus at all. I think it is extremely healthy. But I am expressing a personal view, not the view of the committee. I think there is a tendency in Canada to feel terribly superior about us, and there is absolutely no justification for it whatever, in my view. The Americans are just like us. They have outstanding judges, they have average judges and they have some pretty poor judges. We are not different in those two respects. Certainly the quality of judges is not measured by the fact of whether or not you have public hearings with respect to appointments.

Mr. Gall: The bottom line is that our nominating council would conduct its proceedings in camera.

Mr. Chairman: Thank you very much for your presentation today. I would just note for the record that, in addition to your oral comments, we do of course have the fuller brief that you have submitted, and we will look at that carefully. I think this adds to several concerns that have been expressed, not so much on what Meech Lake does in a constitutional sense but really to a broader issue, whether it is the federal government or the provincial governments involved, as to how we open this process up with the advent of the charter and so on so we really have some better understanding of



who our judges are and so people have a better sense of the process and what is happening.

I am pleased we were able to work this in, especially today, because I know there were various problems with other days. I am very glad it did work out, and we thank you very much for coming here this afternoon.

Mr. Ziegel: Thank you for giving us an opportunity to appear.

Mr. Gall: Thank you, Mr. Chairman. We enjoyed coming.

Mr. Chairman: Have a safe flight home.

J'invite M. André Bordeleau à approcher pour présenter son mémoire. C'est un plaisir pour nous de vous souhaiter la bienvenue cet après-midi. Nous avons une copie de votre présentation. Alors, je vais simplement vous passer la parole. Vous pouvez faire la présentation, puis après, nous allons vous poser des questions.

#### ANDRE G. BORDELEAU

Mr. Bordeleau: Mr. Chairman, ladies and gentlemen, first I should point out that I am not exactly an eloquent speaker, nor am I accustomed to speaking in public, whatever public there is left, so please bear with me.

Je ne suis pas un orateur élégant et je n'ai pas l'habitude de parler devant un public. Alors, je vous prie d'être patients.

I understand we are running late, so rather than read the entire brief and bore everyone to death, I will address only a couple of points and then I will yield for questions.

As a French Quebecer, I oppose the Meech Lake accord, particularly the "distinct society" clause, on the grounds that it would alter the nature of Canadian federalism in creating "deux nations," and it is unfair to linguistic minorities across Canada, particularly the Quebec anglophone community.

Avant tout, je veux éclaircir un point. Le Québec fait partie de la constitution depuis 1867. Même si le Québec a refusé de signer l'accord constitutionnel de 1982, les articles de cet acte s'appliquent au Québec autant qu'aux autres provinces. Le Québec s'est isolé de son propre chef. Il n'en tient qu'au Québec de «se joindre» à la famille constitutionnelle canadienne.

It was a fallacy, in my view, to dub the Constitution Act, 1982, a new Constitution. As far as I am concerned, it was merely a constitutional document added to existing documents that we already had in our Constitution since 1867. It was also false, in my view, to claim that Quebec was out of the Constitution.

Let me put a rhetorical question to this committee. Should Jacques Parizeau accede to power in the next provincial election in Quebec and declare himself dissatisfied with the Meech Lake accord, is Quebec out of the Constitution again until his demands are met?

En tant que Québécois francophone, je refuse d'accepter que le Québec soit une société distincte ou que ce statut soit nécessaire à la pleine participation des Québécois au fédéralisme canadien. Ce statut est une insulte



aux Québécois, une célébration du tribalisme, du nationalisme local et régional. D'ailleurs, on peut certainement arguer que le Québec a été une société distincte pendant 200 ans avant la Révolution tranquille.

On connaît les résultats: La province était arriérée, pauvre et mal éduquée. Je vous en donne un exemple. En 1961, 80 pour cent des jeunes Ontariens âgés de quatorze à 17 ans étaient à l'école, moins de 50 pour cent du même âge au Québec. Pourquoi faut-il maintenant une société distincte basée sur la langue plutôt que sur la religion?

Clause 2(1)(b) could affect the Charter of Rights through section 1 of the charter. For instance, would it be reasonable for a distinct society to restrict the use of English on signs? One should know that subsection 2(3) of the Meech Lake accord refers to the "distinct society" clause, not subsection 2(1), which recognizes the francophone minorities in Canada and the anglophone minority in Quebec.

There is no doubt in my mind that the "distinct society" clause will be interpreted as underlying the French aspect of the province of Quebec and will not necessarily include the anglophone culture. Quebec has shown in the past that it equates protecting the French culture with humiliating the anglophone community.

Ici, je désire exprimer mon appui le plus complet et total à D'Iberville Fortier. Les lois pour protéger...

M. Morin: Pouvez-vous parler un peu plus tranquillement, pour permettre aux interprètes, et à mes collègues aussi, de pouvoir comprendre ce que vous dites?

M. Bordeleau: D'accord, je m'excuse. Ici, je désire exprimer mon appui le plus complet et total à D'Iberville Fortier. Les lois pour protéger la culture francophone ne sont, selon moi, rien d'autre qu'une douce revanche envers les fantômes anglophones d'autrefois. Pourquoi le Québec veut-il toujours se battre contre des revenants? La Loi 101 est raciste, antidémocratique et un affront pour un pays officiellement bilingue - tout ça au nom de la pureté linguistique.

I also want to address briefly what are the legal implications of recognizing Quebec as a society. In the past, Gil Rémillard demanded that Quebec should have a United Nations seat recognizing Quebec as a society. Will it help grant him that wish? That means Quebec could have its own representative at international seminars and conferences.

1600

The second point is that I find it rather ironic that the only true Canadian statesman right around the country is Frank McKenna. I applaud his conditions for improving the Meech Lake accord, although I do have some problems with them. The first one is that, as Premier of the only officially bilingual province, he should have some very deep concerns about a distinct society and should also demand that all levels of government be constitutionally obligated to promote bilingualism. Second, he should insist that the spending powers of the federal government not be curtailed. Finally, as well as demanding protection of women's rights, he should also demand protection of the native people and a fairer treatment of the Yukon and the Northwest Territories.

Finalement, pourquoi promet-on de réviser tout un ordre du jour constitutionnel qui inclut les droits des femmes, les aborigènes, le Yukon, les Territoires-du-Nord-Ouest, la communauté anglophone au Québec et les communautés francophones à l'extérieur du Québec après que l'accord sera devenu partie intégrante de notre constitution? Pourquoi faut-il attendre qu'il y ait dix droits de veto dans la constitution avant de discuter ces importants points sur cet ordre du jour-là? Selon moi, c'est tout simplement pour être capable de faire des demandes pour obtenir plus de pouvoir du gouvernement fédéral en échange de plus de droits aux aborigènes ou aux Territoires-du-Nord-Ouest ou au Yukon.

I would like to close with this remark: I appeal to Premier Peterson to revise his support of the accord. I wish he would demand drastic and important changes to it before he supports it.

Mr. Chairman: Thank you very much. As you have noted, we have your written paper, which expands upon the different points.

Mr. Bordeleau: I did not want to waste too much of your time with a lengthy verbal presentation.

Mr. Chairman: Perhaps we can look at some of those in our question period.

I take it that you do not feel there is any need for a statement in the Constitution with respect to "distinct society."

Mr. Bordeleau: None whatsoever, sir. Once you start, could you not agree that New Brunswick is a distinct society? Could you not agree that British Columbia is a distinct society, that the western regions are several distinct societies, the Maritime provinces? Where does it stop? Why do we have to determine that a distinct society is strictly along linguistic lines? I think this is a step towards complete decentralization and I am very, very concerned about it.

Mr. Chairman: Traditionally, over a great number years, that has been one of the requests, demands--call it what you will--of various Quebec governments. It has been said that the five points that were set out by Mr. Rémillard two years ago were in fact a very minimal set of demands. Assuming that the present government of Quebec believes that the recognition of a distinct society in some form or other is part of any arrangement that would have to be entered into for them to sign the Constitution, where do we find some common ground? In your view, where would we go? Clearly, at least at the present time, the political option to the current government in Quebec would be a separatist government under Jacques Parizeau, and really, regardless of what the Constitution does say or does not say, the separatists are not going to be bound by anything that is there.

If we were to reject the accord, where then do we go? I guess we are conscious here that, as legislators, we can make a report, but the day after we have made our report, have we somehow helped, have we assisted in carrying on the process of dialogue and discussion? I am just not sure what you would replace the--

Mr. Bordeleau: I can live with clause 2(1)(a), but I really do not see the need to add "distinct society." Clause 2(1)(a) recognizes that Quebec is, in the majority, a French province with an anglophone minority. I accept that. That is part of Canada, just as it is part of Canada that the rest of

the provinces are mostly anglophone with pockets of French minorities across the land. I can live with that section, but I really fail to see how it enhances federalism to add that Quebec is a distinct society. Coming from Quebec, I do not feel that it is a distinct society and I do not feel that I need that in order to function in Ontario, in Quebec or in any other province.

M. Morin: Au troisième paragraphe, à la page trois, vous dites: «In the name of linguistic purity, Quebec has taken measures to "protect" French which were not only undemocratic», etc.

M. Bordeleau: Troisième paragraphe?

M. Morin: Troisième paragraphe, c'est le dernier paragraphe, à la fin de la page trois...

M. Bordeleau: Oui, d'accord.

M. Morin: ...d'accord? au sujet de la Loi 101. Franchement, c'est quelque chose qui m'inquiète aussi, la question de protection. Cela n'a pas encore été défini par la loi, par les cours. Qu'est-ce que le mot «protéger» veut dire, réellement? Mon inquiétude, c'est que le mot «protéger» aurait pour fin de donner des droits et d'établir des mesures qui s'appliqueraient seulement au Québec, aux dépens des minorités. Comprenez-vous bien ce que je veux dire?

M. Bordeleau: Oui, puis je vous dis que la société distincte fait exactement la même chose.

M. Morin: Sans employer les mots «société distincte», c'est la question de promouvoir. C'est une responsabilité qu'on ne donne pas aux autres provinces, promouvoir.

M. Bordeleau: C'est pour ça que j'ai dit...

M. Morin: Justement. Je suis un peu d'accord avec vous, je partage votre opinion là-dessus.

M. Bordeleau: Je comprends ça.

M. Morin: C'est que la Loi 101 m'inquiète réellement; c'est qu'elle semble répéter des erreurs qui ont été commises dans le passé, dans d'autres provinces.

M. Bordeleau: Exactement.

M. Morin: A mon point de vue, si on veut réellement progresser et établir l'unité que nous recherchons tous, ce serait franchement d'oublier le passé: de prendre le passé comme expérience, d'accord, mais de ne pas répéter les mêmes erreurs, puisqu'on n'avancera jamais.

M. Bordeleau: Nous autres, on a le même point de vue sur la Loi 101, Monsieur Morin.

M. Morin: Justement, j'ai vécu au Québec, moi, il y a des années, il y a déjà 37 ans passés. Alors, disons que je suis maintenant Ontarien pure laine mais, par contre, j'ai vécu, j'ai été éduqué au Québec, et puis c'est une chose, franchement, que j'ai de la difficulté à accepter. S'il y avait peut-être la possibilité d'expliquer, d'exprimer tout simplement qu'il y a une



société distincte et de permettre aussi de promouvoir, puisque c'est la seule façon de promouvoir, d'être capable de conserver, de protéger la culture, il n'y a rien de mal là-dedans. Au contraire, c'est une chose qui doit être encouragée, de maintenir le statut français, francophone, canadien au Québec; ils l'ont toujours fait. Mais de le faire d'une façon aussi catégorique, aux dépens des minorités... Je veux en venir à ceci: Avant que l'accord soit ratifié, qu'il y ait un moment de répit, un arrêt temporaire, pour pouvoir réellement avoir une définition, avoir un jugement donné par la Cour.

M. Bordeleau: La Cour suprême du Canada?

M. Morin: La Cour suprême. A ce moment-là, mon impression serait que ça enlèverait énormément de doutes et de craintes dans le reste du pays. Avez-vous des commentaires là-dessus?

M. Bordeleau: Oui, je peux accepter ce point de vue-là. Je ne suis certainement pas contre une référence à la Cour suprême du Canada. D'ailleurs, Pierre Elliott Trudeau l'a fait avec son accord constitutionnel en 1981...

M. Morin: Oui.

1610

M. Bordeleau: ...1980, particulièrement. Je suis d'accord avec vous, certainement, au sujet de la Loi 101 et de ses conséquences, mais c'est précisément le point que je faisais: C'est qu'avec la Loi 101, bon d'accord, on a eu tel traitement pendant tant d'années, mais là on va renverser les rôles et puis ça va protéger le français.

D'abord, selon mon point de vue, je connais des personnes dans l'ouest du pays, puis il y a bien des personnes là-bas qui m'ont dit qu'une des raisons, peut-être pas la raison principale mais une des raisons de la résistance au Manitoba, en 1982 ou 1983, à l'égard du projet de loi de M. Pawley visant à renforcer les droits des minorités francophones, était qu'il y avait beaucoup de ressentiment au sujet de la Loi 101 au Québec. Ce n'était peut-être pas la seule raison, je suis sûr qu'il y en avait d'autres, mais c'était une des raisons pour lesquelles il y a eu autant d'intolérance à ce sujet-là.

Mais vous avez parlé d'une pause?

M. Morin: Une pause tout simplement pour dire: Mais voici, avant de ratifier, avant de signer l'accord - on a jusqu'en 1990 pour le faire - s'il y a réellement un doute là-dessus, pourquoi pas avoir une opinion?

Un des témoins que nous avons eus ici, M. Ramsay Cook, n'est pas d'accord du tout. C'est la responsabilité des législateurs de prendre des décisions et de bien expliquer exactement la définition et l'interprétation d'un terme. Moi, ce que je demanderais tout simplement avant de ratifier l'entente, c'est d'abord une interprétation de la cour. Qu'est-ce que ça veut réellement dire, «promouvoir»?

M. Bordeleau: Je suis d'accord. Puisque vous parlez d'une pause, je vous renvoie une question. Accepteriez-vous, pendant cette pause-là, d'avoir une autre conférence constitutionnelle au sujet de l'accord du lac Meech et d'avoir la possibilité de faire des changements?

M. Morin: C'est une question à laquelle je n'ai absolument aucune conclusion, absolument aucune réponse. C'est certainement un problème que nous allons discuter, tous nos collègues, pour être capables d'apporter des recommandations qui seront peut-être acceptées par l'ensemble des provinces, puisque nous sommes les premiers à donner le ton, présentement, c'est la première fois que des audiences sont tenues, et j'ai l'impression que les autres provinces vont certainement analyser de très près les recommandations et les suggestions que nous ferons. Alors, de vous donner une opinion, je n'oserais même pas faire allusion à quoi que ce soit.

M. Bordeleau: D'accord.

M. Morin: C'est tout, Monsieur le Président.

Mrs. Fawcett: Mr. Bordeleau, are you saying that we should scrap the accord and start over again?

Mr. Bordeleau: I would prefer that, yes.

Mrs. Fawcett: You would prefer that.

Mr. Bordeleau: I would prefer that. Mind you, if you want to take the basic skeleton of the accord and make all kinds of changes to it, fine. But it seems to me it would be much easier to negotiate a new package that would be fairer to women, fairer to the anglophone minority, fairer to the Yukon and Northwest Territories, fairer to the aboriginal people and fairer to the recognition of this division of power between the federal government and the provincial governments. If you want to retain the Meech Lake accord and make all those changes within that accord, fine, I have no objection. But it seems to me that if you make all those kinds of changes in depth, you radically change the direction of the accord.

Mrs. Fawcett: What are your thoughts on the idea that some people have suggested here, that of the companion resolutions? Even the aboriginal people brought us the suggestion that possibly the accord could be ratified along with these companion resolutions.

Mr. Bordeleau: I am not familiar with that suggestion. Would the companion resolution have the same force of law in the Constitution as would the Meech Lake accord?

Mrs. Fawcett: They would go along with the accord so that we could at least have Quebec into the Constitution at this time and then some future consideration--

Mr. Bordeleau: As I said before, as far as I am concerned, Quebec has been in the Constitution since 1867, and the only time Quebec had asked Quebecers, "Do you want to give us the mandate to negotiate to get out of it?", the answer was no. That is the first point.

I have no problems, again, with a companion resolution, but then I would make it companion resolutions, in the plural, dealing with the various points mentioned before. At that stage you may end up entrenching one accord and eight different companion resolutions, and which has priority over which under which circumstances may create a bit of a headache to the courts.

Mr. Allen: I wanted in particular to focus for just a quick minute on page 3 of your brief. There you deal with the whole question of what



appears to be happening in Quebec with respect to the desire for a greater assertion of provincial roles with respect to protecting and promoting the distinct character of Quebec in fact in recent years and so on. I am quite puzzled by what you say, because you appear to portray any such undertaking as accompanying the sovereignty-association project of the Parti québécois and the more recent expressions under the Bourassa government of Quebec nationalism as though that is somehow tribalist and backward-looking.

You give the example of Quebec dominated by the church, which you apparently did not think a particularly happy experience, one which was retrogressive, and you wonder why one would want to repeat that experience on a linguistic basis. I have some trouble with the analogy between religion and language but, apart from that, who, in your mind, have been the people in Quebec who have been promoting this new assertiveness of Quebec in the Canadian Confederation, and why have they wanted to do that? Clearly it was not the clerics this time around. Who was it?

Mr. Bordeleau: No, it was not the clerics. Basically, to me, focusing on Bourassa for a second, who in the 1970s and the mid-1980s has been a factor in Quebec nationalism, from my point of view, Bourassa's brand of nationalism says: "Fine, we will stay in Confederation if it is the fédéralisme rentable of the early 1970s, but at the same time we need more power. We need a distinct society and we need to be recognized as a separate entity. We need more powers to deal with culture; we need more powers to deal with the internal affairs of the province."

Why? To me, it is basically a deep-seated feeling of alienation from the other provinces. It is like: "This is our home. We will stay within Canada, but let us make this our home." Maybe I am being unfair to Mr. Bourassa and his colleagues, but I see this not as much as a fear but as basically being told that Quebec is different from the other provinces. It is, linguistically, but I have been living in Ontario for 11 years now and, as far as I am concerned, I feel just as much at home here as I do going back to Quebec. For that matter, when I go across the country I feel just as much at home travelling through the western provinces as through the eastern provinces.

Mr. Allen: I feel at home in Quebec, but I also feel different. I think that is the difference.

The question is an important one, because political élites really are there on the surface--the Bourassas and the Lévesques and the bureaucrats who surround them--but underneath them something is happening that is very common through those regimes. That is why we keep getting similar kinds of demands, somewhat in different guises, sometimes more extreme and sometimes less extreme, but they are all there.

Most commentators I have read suggest that the driving force of the new Quebec has been the rising commercial and professional élites in Quebec, who have been seeking a greater expansiveness, larger arenas to play in, and have found themselves very much impeded by the dominance of Quebec life by anglophone groups who maintained the managerial élites in the commercial world and generally pulled the levers in so many other respects. For them to become new, outward-looking, dynamic players in a new world at home, in North America and around the world, it was necessary for them to stake out some new terrain and to grab hold of it pretty dramatically. They are still doing that.



1620

What I am wondering out loud with you is whether we are not seeing something that really is quite the contrary of being tribalistic, inward-looking, regressive, socially reactionary, etc.: something that is very progressive, dynamic, outward-looking and is trying to find its place in a larger world, not only Canada and North America but the world. This is their way of doing it and they necessarily are going to push upon the structures of Confederation. But, for the moment, the debate goes on, and we keep on finding ways, as we have five times already in our history, to sort of find a new structure for all that to live in. It takes a different shape each time we do it, but none the less, we get a bigger framework, we get a bigger world for all of us out of it and we still seem to manage to hang on to our country.

Is that not a much more hopeful way of looking at what is happening in Quebec than the picture you give on page 3?

Mr. Bordeleau: It depends on your point of view, sir. First of all, the example you gave at the beginning, that of the anglophone pulling the levers, keeping the French Canadians down and preventing them from going outwards, to me, is a very, very old cliché and, as far as I am concerned, it no longer exists. It has not existed in years, not that I am aware of, anyway.

Again, yes, Quebec might be reaching out, but all the social actions that have been taken in that province, say, since 1976, have been directed inward. To me, Bill 101 is not a statement of a people, of a culture trying to reach out and finally expand into the world. It is a statement that this is our home and this is the way we want it with very, very little forethought not only to the anglophone minority in Quebec but to the impact it might have on the francophone minorities outside Quebec. I do not see that at all as being outward.

Mr. Allen: I would say it is a necessary part of the process of taking charge and it established a sense of confidence among the population in Quebec to have Bill 101, which is, after all, challengeable by anybody who is aggrieved with it in the courts, and that process is still under way. Whatever the judgements may be, they will be legitimately taken with respect to other aspects of the Constitution that affirm the wholeness of the country and educational rights and all sorts of other things that are there.

I think unless you appreciate that that is what was happening, that there was a sort of taking charge, you do not then appreciate some other things that were happening in Quebec at the same time: why, at the very same time as that was happening, there was a good deal of relaxation taking place in the interpersonal relations between English and French in Quebec. A lot of old animosities were in fact draining away. The confidence they secured enabled them then to move into what we have seen happening in Quebec socially: for example, the massive enrolments in English conversation classes by Québécois. It is an apparently contradictory phenomenon, but none the less I think that is a sign of the extent of what has been going on through the agency of the Quiet Revolution, the PQ and the Bourassa regime so that you get a new, outward-looking Quebec.

That is obviously going to put pressure on us, but I do not think it is necessarily our role to be too defensive about that and to think that, as those things consolidate themselves in Quebec and then put that pressure on us, somehow we are going to end up with the two-nation proposition and we are suddenly going to find ourselves in two nations. The more defensive we are in

response to that, the less likelihood there is that we will survive, surely.

Mr. Bordeleau: First of all, for a culture moving outwardly, why would it need a "distinct society" clause? What is its purpose? What outward purpose would it serve?

Mr. Allen: I think that, on the one hand, it has a symbolic value which says that the rest of Canada does at last recognize that (1) there is that culture there; (2) it is distinctive; (3) the government that governs the province does have some distinctive roles to play in protecting it and promoting it over against the North American milieu, which is dominantly anglophone, and over against the world at large, which is increasingly English-speaking. We all know what is happening to the linguistic pattern of the world at large. I am not sure I see a problem with us saying that, recognizing it, and then getting on with the business of living together tomorrow.

Mr. Bordeleau: But that distinct society that you mention as necessary also threatens the anglophone minority.

Mr. Allen: Not necessarily. We have heard significant testimony that tells us that is why "distinct society" is in a different clause than the dualism clauses, and that "distinct society" refers to a broader range of phenomena than language, or to a single language group, or to the dualism question. It does commit the government to promote a society that has had a historic English minority, and it does commit it to promote the other aspects of that society that are nonlinguistic--the civil law, for example--and the defence of other unique characteristics of the culture are quite beyond the issue of language per se.

Mr. Bordeleau: I understand your point.

Mr. Allen: I am just answering your question.

Mr. Bordeleau: Yes, I know. I understand your point.

Mr. Chairman: Perhaps, in a sense, we have placed that on the record. I think part of the purpose of the hearings, in effect, is to bring those views forward where we can try to wrestle with them and take meaning from them.

I would like to thank you very much on behalf of the committee for coming today. I would be remiss if I did not also offer you the committee's best wishes. I understand, as one aspect of outward-looking, you are hoping to be in Seoul, Korea this summer as a member of the Canadian Olympic team. We want to wish you the very best in the pursuit of that goal and hope you make it. We thank you for taking time out of--I believe it is riflery that you are involved in, is that correct?

Mr. Bordeleau: Yes.

Mr. Chairman: Thank you for not bringing the gun here today.

Mr. Bordeleau: I was tempted.

Mr. Chairman: We wish you all the best. Thank you very much for coming and sharing your thoughts with us.



Mr. Bordeleau: Thank you very much. It is nice to get a day off from training.

Mr. Chairman: If I might then call upon the representatives of the Council of Christian Reformed Churches in Canada. If they would be good enough to come forward; Aileen Van Ginkel, the research and communication associate, and Rev. Arie Van Eek, the executive secretary of the council.

We want to thank you for joining us today. We have circulated a copy of your submission and, in the interest of giving you as much time as possible, let me just turn it over to you. If you will, go ahead and make the submission and we will follow up with questions.

#### COUNCIL OF CHRISTIAN REFORMED CHURCHES IN CANADA

Mrs. Van Ginkel: The committee for contact with the government, which we represent here today, is a standing committee of the Council of Christian Reformed Churches in Canada. Our committee seeks to hold before Canada's political leaders the guiding principles that apply to major issues of our day.

We believe that governments are responsible to God in the exercise of their calling to do justice, and that the proper administration of justice will assure all citizens of their personal safety and of the opportunity to develop their individual and communal character. Hence the task of the state in pluralistic Canada must be directed toward the total wellbeing of all people within the framework of just and nondiscriminatory laws.

#### 1630

In constitutional terms this means that our governments, federal and provincial, must use their authority to establish and maintain a public order within which the various communities across Canada can assume their own societal responsibilities: for example, providing education for children, caring for the elderly and those who are disadvantaged or disabled, encouraging cultural and artistic expression and supporting family and human relationships to name just a few. We do not believe that these tasks ought to be assumed by government alone.

Our vision for Canada is characterized by neither a collectivist model nor one based exclusively on the predominance of the individual. Rather we see a country rich in a diversity of communities each of which contributes to the wellbeing of the realm generally and its citizens individually.

We believe that governments should extend to aboriginal peoples the full protection and free exercise of their rights to care for their own people and to promote their distinct identity. Governments should also encourage the rights of parents and communities to educate their children according to their own basic convictions without financial penalty and should enable citizens to form and support trade, business and professional organizations of their own choosing.

Neither the present Canadian Constitution nor the amendments proposed in the Meech Lake constitutional accord recognize the full diversity of communities in Canada nor do they establish the framework needed to encourage such diversity.

Section 2 of the proposed Constitution Act 1987, while it rightfully



recognizes Quebec as a distinct society, presents a truncated picture of what constitutes Canadian society. As an interpretive clause, section 2 should include two other fundamental characteristics of Canada--namely, recognition of the aboriginal peoples as founding and distinct societies in Canada and recognition of the other faith-related, cultural, geographic and/or linguistic communities which are part of the Canadian mosaic.

Just as Quebec is given the right to preserve and promote its distinct identity in subsection 2(3) of the Constitution Act 1987 so the aboriginal peoples and the various communities of Canada should be given the right and the necessary power to carry out their own responsibilities as they see them.

We recognize that the concept of aboriginal and community rights must be worked out more fully within the context of the Canadian Charter of Rights and Freedoms. Here again the Meech Lake accord reflects a missed opportunity. Aboriginal and communal rights as well as the broader concept of pluralism in Canada should have been included in the agenda for future constitutional conferences.

On the basis of our concern that the Canadian Constitution reflect and encourage the Canadian reality we respectfully suggest that the select committee on constitutional reform recommend to the Legislative Assembly of Ontario that the Constitution Act 1987 not be ratified without amendment to those sections of the act which deal with how the Canadian Constitution ought to be interpreted--section 2--and with future development of the Constitution--section 50.

Mr. Chairman: I think we had some time ago in our hearings--I am just trying to remember the group which escapes me at the moment--a group which also discussed the concept of pluralism and how that ought to be recognized in the Constitution.

I am wondering if you could perhaps just expand a bit this notion of communal rights and pluralism and how it would reflect that in the Constitution. Yesterday we had a very interesting discussion with the president of the German Canadian Congress in terms of how multiculturalism might be reflected. For example in section 2 is the phrase "a fundamental characteristic of Canada." What would be a Canadian's understanding of this? Again, here in terms of pluralism and communal rights, I think we all have a certain sense of what those might mean, although relative to some other terms that we are now using in the Constitution, they are newer.

Could you expand a bit on what you would be intending to include in those concepts?

Ms. Van Ginkel: I think by talking about multiculturalism, we would include multiculturalism in our sense of pluralism.

Mr. Chairman: Yes.

Ms. Van Ginkel: That suggests that Canadian society or the Constitution ought to reflect more than simply the fact that there are people of various cultural heritages in Canada.

It seems to us, at this point, that it does not go much beyond saying, "Well, isn't it wonderful that you're a German Canadian and that you're an Asian Canadian?" We would want to say, "Let's go one step further and allow that cultural heritage or, in our case, we would consider it to be more of a

religious heritage, to be expressed in certain ways, and how each community would express it would, I think, vary according to that particular heritage that it represents.

So the kind of communal rights that would be important to establishing the Constitution would have to be fairly wide-ranging, I would think. In some communities, language rights would be paramount. In other communities, it might be rights to worship on a particular day. A Muslim community, for instance, might want to protect the right to worship on a Friday. In our community, we consider educational rights to be very important.

I think that what we would like to see is a country in which communities take on more responsibility than they do right now for looking after some of the social needs of individuals throughout the country. In other words, it seems to us sometimes that we have a country made up of various individuals with a government looking after them, looking after their social needs, but no intermediate structures to do that, perhaps in a more personal way, in a more holistic way.

Mr. Chairman: I suppose, in terms of the way a number of those communities are defined, there is a religious aspect. Particularly, with the emphasis on everything being "public" and nondenominational, then those groups and, I think, in your own case, in terms of the educational system, feel that, while there might be certain aspects of that system which would meet some of your needs, there are things that it does not do and that you want to do, and so, you would like to see those somehow defined or placed in the Constitution. That would then provide you with some protection, for example, in terms of religious education for your children.

Would that be one specific example of what you would be thinking of there?

Mr. Van Eek: I think, Mr. Chairman, if I may, it would be fair to say that what we want to see is that be recognized which is constitutive of the strengths of Canada. Beyond multiculturalism, Quebec, for example, is arguing for something much more deep-seated in terms of its history and in terms of its current life.

Whereas Quebec is arguing for something that is communal, we on the anglo side, are much more inclined to think individualistically and, in so doing, threaten to lose sight of the communities which together can work and, in a great measure, do work for mutual enrichment.

So we are not particularly arguing for something that we do not have yet in legislation. It goes rather a lot further. The multiculturalism of yesteryear should be replaced by an acknowledgement of the deeper streams, religious, philosophical and their expression.

Mr. Chairman: In that sense, really viewing the concept of pluralism as a much broader term than multiculturalism?

Mr. Van Eek: Yes, really no community would be outside of its scope.

Mr. Chairman: Yes.

Mr. Van Eek: If it is incorporated--

Mr. Chairman: That is an interesting element.



Mr. Allen: In one form or another, the Christian Reformed Churches in Ontario make representations to our legislative committees with some reasonable frequency and usually in a very thoughtful way, and in briefs that are well researched. I know that your Citizens for Public Justice, for example, which is not simply Christian Reformed, but at least is initiated by your own community, has done some very important social justice work in Ontario. I want to mention that.

1640

I am also personally pleased to receive a brief that does make some reference to the religious dimension of our life together. I think we often do not spend much time thinking about what deity means for politics any more; however, we may apply that in our life together. It certainly does suggest that we all should maintain some overarching commitment to a concept that there is something as ultimately true and something as ultimately right. We may not in our everyday experience all find total agreement with what that is, but it remains a very central part of our life together.

One question I have with respect to what you suggest with regard to a new recognition of groups and communities in our society in our Constitution is whether there ultimately is not implied a very dramatically different kind of society than the one we presently have. I am not saying I am opposed to that, but it is something that begins to take a different shape and form.

I think, for example, of what is happening in Ontario with respect to native peoples, aboriginal peoples, where some of them are now entering into contracts with government departments to offer the services that otherwise would be offered by voluntary or community organizations of another kind. Children's aid, for example, in some of the northwest reserves is now taken over by those communities, and I think that is very wholesome and healthy.

I am wondering whether when we start building cultural communities like that, one after the other, into the Constitution, we are saying that ultimately those are the agencies that should be handling not just education in one case, not just children's aid in another, but whole panoplies of social programs for distinctive communities on a semi-autonomous, self-governing basis in Canada. I get an image of a quite different kind of Canada in structure and delivery of programs, governance, the whole business.

My concern is that we are not quite ready to put that constitutionally yet, because I am not sure that we are quite certain what all that means or, indeed, if that is what is implied in moving from recognition of aboriginal cultural identity and rights through to other kinds of cultural identities and rights in Canada. Are you asking us something quite specific with respect to new ways of behaving in that sense? Or are you asking us something that still is at more of the level of recognition of multicultural enhancement in a more general and low-key kind of way?

Mrs. Van Ginkel: I think it is probably a little bit more of the former. We probably are looking at something that is quite different. We are probably looking at a government which would, in one sense, give up some of the responsibility it now has for various social programs. But the government would still play a very necessary role in enabling communities to take up responsibilities and in co-ordinating, making sure there are proper standards, making sure the communities work well with each other, and so on. The government would still have a very important role.

But all of that is in the way of speculation, and I suppose we are



suggesting that we really could not expect more of the Constitution at this point than that it recognize that there are other distinct societies in communities in Canada besides French-speaking and English-speaking. We would, for instance, want to say that the aboriginal peoples of Canada represent a distinct society on their own. I do not think that we would say that our community is a distinct society. There is probably another category there that we are looking at but we have used the word "communities."

In that sense, I suppose we would suggest that the constitutional accord simply reflect the fact that Canada is made up of a diversity of societies and communities. Beyond that we would like to see in the agenda for constitutional reform some very detailed and specific examination of how Canadian society could be restructured so that these various communities can develop their character and potential and, hopefully, enrich the Canadian nation as a whole.

**Mr. Allen:** My sense is that the reason we are able to, now at last, begin to think in terms of distinct society for Quebec and entrenching dualism in the Constitution is that we have had long, long experience trying to wrestle some of those problems of Quebec, Canada, bilingualism, etc., to the ground.

We have a fairly clear focus as to what it means in some institutional terms, what it implies for immigration, what it means for shared-cost programs and optings-out and all those things. I have a sense we are not quite at the point where we have developed enough of a sense of what you are pointing us to, that one can meaningfully put much more in the Constitution than is there now. Is it fair to observe that?

**Mr. Van Eek:** Well, not 100 per cent. What we are at is the point where we see that society becomes increasingly fragmented, partly under the influence of a strong push in the direction of putting in law the rights of individuals of whatever persuasion, but that that is not balanced sufficiently with the recognition that individuals do not constitute a society and that society is made up of groups of individuals who have covenanted together through various processes to do things communally..

I am perfectly comfortable with our provincial and our municipal governments handling the matter of enforcement of criminal law, say, but I have a lot of sympathy, Dr. Allen, with the native people saying, "We have our own history and our own ethos and our own understanding of how to apply retributive justice." I should have a lot of sympathy with such communities receiving the freedom to structure themselves that way.

As you know so very well, we have a very strong feeling that the responsibility for education ought to be as closely brought back to the original educators, the parents, as is possible and consonant with the rights and the duties of the state for the creation and maintenance of an orderly society. We find that in the marketplace we apply this kind of situation where there may be a certain competitiveness about all of that that we do not apply in other cultural areas which are really more significant for determining the kind of life that you and I experience in our beautiful country..

It applies differently; but minimally, we are going all out for the rights of native people because there is a history, there is a culture, that is really being threatened at this point in its life in a way that we do not experience as people who determine everything perhaps a bit more directly out of a shared religious conviction that is being practised and taught and so on. For example, why should native people not have an opportunity to teach their

children their view of history? You know it will be markedly different, but so is the view of history of the Québécois vis-à-vis the English and other conquering people.

Mr. Chairman: As we draw to the end of our sixth week of hearings and on the eve of Good Friday and this weekend, it is appropriate perhaps that we end on a note that speaks about some much broader elements and aspects of our country, including the religious component which, while very diverse, is one that we so often somehow do not deal with or do not raise in this whole area. I think it is an area, as Dr. Allen has suggested, which is quite new in many respects for us to grapple with in a constitutional sense.

You have underlined some thoughts that we do want to think about and reflect on in terms of how we would go about trying to recognize those kinds of differences in a positive way and in a very pluralistic society, unlike over 100 years when we were primarily a country whose background was the Christian faith. Today we have a good number of different religious groups, not to mention different cultural groups and racial groups. In that sense, our country is really in the forefront of trying to come to grips with both the challenges and the problems that puts forward.

In that context, this is a good way to end our hearings this week. We want to thank you very much for coming here today and sharing your thoughts with us.

Mr. Van Eek: Thank you very much for the opportunity. We hope you may have a happy holiday season.

Mr. Chairman: The same to you. The committee stands adjourned until 9:30 a.m. on Wednesday of next week.

The committee adjourned at 4:51 p.m.





ABON  
XCB  
-87032

C-23a  
(Printed as C-23)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 6, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Also taking part:

Pope, Alan W. (Cochrane South PC)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witness:

Individual Presentation:

Radwanski, George

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 6, 1988

The committee met at 10:11 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good morning, ladies and gentlemen. We can begin today's session. I would like to invite George Radwanski to come forward and be our first witness this morning. Welcome. Since you have reorganized our education system, it is a pleasure to have you here this morning to help us through the mysteries and vagaries of constitution-making. Our procedures are fairly simple. If you would like to go ahead and make your presentation, we will then follow up with a period of questions.

GEORGE RADWANSKI

Mr. Radwanski: Thank you. Good morning. I appreciate the opportunity to be here today and share some thoughts with you on the Constitution. I am appearing to speak from the perspective of someone who, first of all, has lived the majority of his life in Quebec; has a very good knowledge of that society; has worked as a journalist both in Quebec and in the federal system in Ottawa, as well as here in Ontario; has also studied constitutional law and hence, I hope, has a certain kind of perspective to bring to all this.

I also recently agreed, once I was free of my government responsibilities, to serve as chairman of the Canadian Coalition on the Constitution, which, as you know, is a national group of people who have various concerns about this accord. But I am speaking today really in my capacity as a citizen rather than in any formal way on behalf of the coalition.

I would like to preface my remarks also by saying that, like anyone who has read the media, I am well aware of all the speculation that the work of this committee is, in a sense, an irrelevancy, that the outcome is preordained and that when all is said and done, it is just going to be another rubber stamp. For what it is worth, I want my request to testify and my presence here to be both an expression of faith that that is not the case and, as well, a plea that it not be the case.

I operate from the premise that all of you who are here and who chose to run for public office did so for reasons beyond simple ambition or desire for the easy life that, of course, being an MPP entails--said I sarcastically, I hasten to add, so as not to appear in Hansard as though I was saying that with any seriousness. I honestly believe that however long you are in public life and elected life, each of you will never have a responsibility greater or more fundamental than the one with which you have been entrusted on this committee.

Given the way the accord was reached, which is to say 11 men meeting into the late hours of the night in all good faith but with insufficient opportunity either to consult broadly or even to think through in detail all the implications of what they were doing, and given the requirement that this be approved by all the legislatures, you, who are really the only sustained scrutiny there will be in the Ontario system before Ontario makes its decision, have an absolutely historic role, each of you, because we are



dealing here not with some technical piece of legislation but with, as you know, the fundamental law of our country. I guess, as a student of public office, a student of public life, I cannot believe that, as individuals, any of you would put that responsibility for the whole structure and future of our country second to matters of party discipline, political ambition or any other considerations. I believe the constitutional future of our country is not a political matter but a fundamental matter of conscience, and I approach it in the faith that this view will ultimately be shared.

In terms of the issues I want to raise with you today, I guess it is no secret to anyone who saw the articles I wrote in the Star some time ago that I believe the accord is fundamentally flawed in all its major provisions. I will speak briefly about why I feel that way, but rather than dwell on that, which you have been hearing from a great succession of witnesses, I would like to focus primarily on this whole perception, which certainly has been fed in some quarters and which I am sure is troubling the committee, that we are in some kind of emergency situation where, good, bad or indifferent, this deal has to be passed because to do otherwise would have some kind of adverse implications for national unity, or that it would be so badly received in Quebec if this were turned down, or that somehow, by hook or by crook, with all the urgency at our disposal, we have to "bring Quebec into the Constitution." I do not share the view that that is our present situation and I would like to focus a little on explaining why not.

First of all, I think it is simply an absurdity, both in legal terms as well as in political and even moral terms, to say that Quebec has to be brought into the Constitution, as if Quebec were not now in the Canadian Constitution. Legally, the Supreme Court declared with all the clarity at its disposal on December 6, 1982: "The Constitution Act, 1982, is now in force. Its legality is neither challenged nor assailable." So legally, Quebec is in the Constitution. We do not have to bring it in.

Politically and morally, I think the issue is no less clear. It is true that a separatist Premier of Quebec refused to sign an instrument of nation-building and that the Legislature supported him in that act. But it is no less true that the same constitutional deal, the Constitution that came into effect in 1982, was approved in December 1981 by 72 out of 75 of the duly elected members of Parliament from Quebec. To say that these elected representatives of the people of Quebec somehow have less legitimacy than the provincially elected ones or that somehow Quebec politically has not approved the accord, even though virtually all the elected federal representatives from Quebec did support it, is to take a very peculiar view of the legitimacy of the federal representation of Quebec. It is certainly a view that I do not share.

Then more broadly in terms of the public constituency, I think it is also important to note that there simply is no evidence--I will go more strongly than that--there is evidence to the contrary, that a majority of the Quebec people were not dissatisfied with the provisions of the 1982 Constitution and in fact did not support the decision of the then government not to endorse it.

For instance, a Gallup poll published on December 10, 1981, found that only 34 per cent of Quebecers agreed with Lévesque's refusal to sign the constitutional accord in November, 46 per cent disagreed and 20 per cent either had no opinion or were unfamiliar with the issue. Another Gallup poll published on June 19, 1982, found that only 16 per cent of Quebecers disagreed that the new Constitution would have positive effects for Canada.

By the same token, we need only look at the political phenomenon that occurred in Quebec following the passage of that Constitution. I think the evidence is clear that the people of Quebec did not rally around the Parti québécois and say: "Well, Quebec has been shafted. Therefore, we must move in the direction of greater nationalism, greater separatism. We must throw our weight behind this governing party." Quite the contrary. We know that government was defeated.

We also know, if you look at the polls subsequent to the Meech Lake accord, that there was not even a momentary upward blip in the months following that accord in the popularity of the Mulroney government in Quebec. Surely if this accord were the breakthrough that Quebecers were waiting for, the great bringing into the Constitution that they had awaited, we would have seen that reflected in some expression of electoral enthusiasm for the Prime Minister and the party that had brought them this great constitutional reawakening, and it was not.

1020

The reason it was not, and the reason I think there is a misperception of the issue, is that one has to distinguish between the political élite in Quebec, a relatively small group--the so-called political, even artistic, élite; very much a minority--and the great mass of Quebecers. There is, and historically always has been, a very strong sense of inward-looking provincial nationalism among a certain political and intellectual élite in Quebec, but anyone who has lived in Quebec and who is familiar with Quebec will tell you that that sense does not extend to the great mass of Quebecers. Indeed, I think it is no exaggeration to say that constitutional issues are not the kind of preoccupation of the average Quebecer that we somehow, in the rest of Canada, tend to think they are.

It is a preoccupation of Quebecers that the rest of the country be open to them, that they not feel like second-class citizens, that they be cared about and so on. It is not a preoccupation of the ordinary Quebecer that Quebec be granted additional special powers or that the Constitution be turned on its head to accommodate some special wish of Quebec.

Again, the phenomenological, if you want, evidence of that is the succession of times in which certainly the Liberal government of Mr. Trudeau and, even before, that of Mr. Pearson were elected with substantial, overwhelming majorities in Quebec despite a very clear-cut position that Quebec should not be given exceptional or additional powers in the Constitution.

Having said that I do not believe Quebec has in any way been excluded from the Constitution and therefore does not need to be urgently or dramatically brought in, I think it is also profoundly insulting to Quebec--unintentionally so, of course--to believe that, as a society, it is still so politically immature that a decision by the rest of Canada or by any Canadian province that this particular deal is not a good deal and should not go forward would cause Quebecers somehow to rise up and question their commitment to federalism or would provoke some kind of separatist crisis. To say that is to say that Quebec is an immature society in a way I do not believe it is.

In 1971 we had a national deal, the Victoria accord. The Premier of Quebec, the same Robert Bourassa, was a signatory to that deal. He went home to Quebec, consulted some people and said: "Well, on reflection, it's not such



a good deal at all. We withdraw our approval." The rest of the country did not turn on Quebec and say: "In that case, the hell with them. We question whether we want Quebec in Canada," or: "So much for them. We are not going to do anything more for them."

In a reverse situation, if one or several provinces say, "Look, this deal just is not in the national interest and not even in the interests of Quebec, from our perspective," to say that in those circumstances Quebecers would rise up in indignation is really to do a disservice to Quebec and I think to fundamentally insult them.

It also, I believe, is an error to think that this deal, as it stands, would somehow once and for all put separatism to bed and remove the problem. Quite the contrary. The separatists, and even the nonseparatist, strong Quebec nationalists, are very much on record as saying this deal is not good enough, does not satisfy them, on one hand. On the other, Mr. Parizeau and his party are on record as saying that even though they do not think it is a good deal, by golly, if they ever come to power--as I imagine, being the only effective opposition in Quebec, eventually they will again--they will do everything to use the provisions of that deal to the detriment of national unity and to advance the separatist cause. So to think that we are somehow ending separatism with that stuff, I think, is a profound error.

Setting aside the fact that I do not think it needs to be brought in in that sense, it makes profoundly little sense to talk about bringing Quebec into the Constitution of 1982 through an accord, through a set of provisions that, in effect, turn that Constitution of 1982 inside out, reverse its direction and really dismantle its whole thrust. What do I mean by that? The Constitution of 1982 was designed in a spirit of pan-Canadianism. Its fundamental premise was one of saying that we are all one country, we all have to reduce the barriers to the two languages nationwide and our 10 provinces essentially equal one central government--a broad pan-Canadian vision of Canada.

The Meech Lake accord is based on a dualistic vision of Canada instead of that pan-Canadianism. It says there are nine provinces and there is Quebec, and we will reinforce the differences instead of strengthening the bonds of unity. The 1982 Constitution, as I said, was predicated on the notion of a strong central government that would ensure that while regional interests certainly had full play, the broad national interest would prevail over narrower, self-seeking parochial concerns. The Constitution that we would have under the Meech Lake accord fundamentally weakens the power of the central government and brings a steady erosion of power to the provinces.

The Constitution of 1982 had as one of its centre-pieces an enshrinement of the fundamental rights and freedoms of all Canadians from coast to coast in a way that was intended, as much as possible, to be above other considerations. The Meech Lake accord creates two classes of constitutional rights, one in the rest of the country and another in Quebec, and in Quebec permits fundamental individual rights and freedoms to be subordinated to a notion of the rights of the collectivity.

When one looks at all these fundamental differences, then the rhetoric of bringing Quebec into the Constitution, I think, is at best a misnomer and at worst a sham. You cannot bring Quebec into the Constitution by gutting the Constitution. Why are we doing all this? Not because there was some emergency in Quebec that required it. Yes, it would be desirable to have some government of Quebec eventually sign either the existing Constitution or some modified



constitutional deal. But it is not urgent, it is not imperative, it is not an emergency, first of all.

Second, when one looks at the specific provisions of the deal, whether touching on the Supreme Court, the Senate or the federal spending power and so on, there has simply been no demonstration with regard to any of those provisions that it meets a national need: if the Supreme Court were working badly or unfairly or in a biased and dishonest way so we had to change the way the justices are chosen; or if the current workings of the Senate were contrary to national unity or were profoundly unfair to the provinces so we had to change the composition of the Senate; or if the federal spending power had worked against the interests of ordinary Canadians and the interests of the wellbeing of our country in such a way that, by God, we had to put chains on it and stop the federal government from ever being able to do that kind of thing again.

There has not been that demonstration. In the absence of it, one has to ask, what are we doing to this country of ours? I fear that what we are doing is not only fundamentally reversing a great deal of what we have accomplished, not only over the past decades but over the century plus of our existence as a country, but quite literally risking putting our nation on the route to disintegration.

Now, there are people who say: "The accord does not mean very much. It just enshrines what is already the case." If that is so, why bother? In view of all the concerns you have heard here, the concerns that have been raised before the federal Parliament and so on, if it does nothing, what is the almighty urgency when so many Canadians are frightened of it? If it does something, then we have to ask ourselves with great seriousness, what is it that it does? What does it mean if it means anything? Let us look briefly at some of those things.

#### 1030

The "distinct society" provision: Either it means nothing or it means something. If it means nothing, in that case it is a hoax being perpetrated on the people of Quebec and on public opinion in Quebec, who are being told by their leaders that it does mean something. Then when they find out it means nothing, they are not going to thank us and certainly their spirit of national unity will not be strengthened, because they will feel that they have been taken to the cleaners with a lack of candor or that a deal that once was made and accepted by every province and by the federal government, if the process goes through, is being reneged on in some way.

If it means something, what can it mean, Quebec as a distinct society? If we look at the nature of Canada, every Canadian province is in some ways a distinct society. I do not think I need to elaborate on this theme, but Newfoundland society is as distinct from Alberta society, certainly, as Quebec society is from Ontario society, in a great many ways. You could say that of every province.

It is precisely because we regard all our provinces as in some way distinct societies that we are a federal state and not a unitary one. It is precisely because of this that we have a division of powers under sections 91 and 92 of the Constitution, under which we have said that those powers that are relevant to reflecting the distinct nature of each of the provinces, of each of the societies in Canada, should be wielded by those provinces, whether it be powers over education, over the delivery of social programs, the

regulation of trade and commerce within the province and so on and so forth. That is why they are under provincial jurisdiction.

At the same time, we have said that because we want the whole to be greater than the parts, then other powers which pertain to maintaining our country as a whole should be in the federal domain. Having said that all provinces are distinct and therefore have certain powers, if we now pass a constitution and say, "Yes, but Quebec is more distinct than all the other provinces, and not only is it more distinct but the government of Quebec has an obligation under this new Constitution, not only to maintain that distinctness but to promote it, to make Quebec ever more distinct," what does that mean?

What can it mean other than if Quebec is to be more distinct than all the other provinces which have powers to reflect their distinctness, then Quebec must wield more powers than other provinces, and where are those powers to come from except from the powers that now accrue to the centre in the name of the national interest?

Yes, one can say that is a far-fetched view and it does not mean that. Then we have the remarkable paradox that while the Premier of Ontario and other premiers say, "It is just a reflection of the status quo and it means nothing," The Premier of Quebec stands up in the Legislature of Quebec and says, "This is a great breakthrough and it means a great deal." Both cannot be true.

If it means anything, it means a circumstance in which, increasingly, Quebec, in the name of this distinctness--I am not talking about next year or the year after but over years, over decades--will accrue unto itself more and more powers and in which, increasingly, what is important to Quebecers will be regarded as a domain of the government of Quebec, and in consequence Quebecers will increasingly have reason to look inward rather than to the country as a whole. Coupled with the effects of free trade--I could talk a lot about that but I will not for now--in consequence, federalism will become less and less relevant to Quebecers. That does not strengthen national unity; it sets a time bomb at its very heart.

To understand that, I think one has to understand that historically in Canada, there have been two rival nationalisms. There is a Canadian nationalism, the belief in Canada that most Canadians have, and there is also a French Canadian or Quebec nationalism that certainly has been historically promulgated, at least by an elite in Quebec.

Those nationalisms are irreconcilable and diverging, except for one formula--at least I can see no other--and that is a formula that has been in effect or that has been increasingly advanced over the last several decades, which subsumes French nationalism within Canadian nationalism, which says, "Masters in your own house, yes, but your house is the whole of Canada." Hence the commitment to minority rights across the country, contrary to the kinds of horrors and idiocies we are now seeing in Saskatchewan. Hence telling French Canadians that not only their government in Quebec, but the national government is responsible for the maintenance and promotion of the distinctness of the French language and the French culture within Canada and so forth.

To move away from that and say that only Quebec and the Quebec government is a protector of the French fact and the French language, and that kind of idealism, is basically to put the two nationalisms on a collision



course that eventually risks spelling the end of Canada. Now, it may be said: "It will not happen. It means nothing. It is just another technical reiteration of what already exists."

The very least that can be said is that we do not know. Who will know? How will we know? When the courts decide. And what courts? One of the other provisions of the accord is that, henceforth, the Supreme Court which is the ultimate arbiter of what this thing means will at some point in the future be wholly the creature of the provinces. Why are we transferring the power to effectively select the justices of the Supreme Court from the federal government to the provinces? Why is that attractive to the provinces? Why does it matter?

I do not believe it is because of concern about making sure that the justices have a certain view of property law, or civil law or, "By golly, what will the justices of the Supreme Court say about divorce law, so we had better make sure we can pick who it is?" If that is a plum for the provinces, if that is a meaningful concession, it is precisely because of the issues of national unity and federal-provincial relations. It is precisely attractive to the provinces, if at all, to enable them to put forward only nominees that share a certain provincialist, if you will, bias in terms of the balance of powers federally and provincially, a certain predisposition to regard the intent of the Canadian Constitution to be one of giving maximum scope to regional diversity and provincial interests.

Quebec, when this thing comes to full bloom, is to have three justices on the Supreme Court chosen effectively by the government of Quebec, put forward only by the government of Quebec. They are not going to be chosen for their belief that the "distinct society" provisions mean nothing. I think I can tell you that with some conviction. With those three justices, only two more from the other six, probably provincially oriented justices on that court, and "distinct society" will mean a very great deal indeed.

How do we sit here with any confidence and say it will not? For that matter, when one looks at the composition of the Supreme Court that at some point it will have, the same is true of any issue that tests the capacity of the federal government to govern in the national interest if a province or several provinces would prefer it not to make that particular decision. Building in a provincially biased Supreme Court again strikes at our capacity to function as a sovereign, unified, commonly directed nation.

Then we have that remarkable provision regarding the composition of the Senate. Again, the provinces are going to choose senators. Fine; whom are they going to appoint? Presumably they are going to appoint people with links, at least of sympathy, to the provincial government, to provincial interests. I am not saying people of low quality necessarily, probably not at all, but people with sympathy towards the provincial view. Why else is a provincially selected Senate a meaningful concession? At some point, when all this comes to full flower, there is going to be a Senate composed primarily, and then totally, of people chosen that way by the provinces. What do we think will then happen to the federal power when you consider that this Senate has an absolute veto over every piece of legislation passed by the House of Commons? Not a suspensive veto; an absolute permanent veto.

1040

I have used the analogy that this arrangement is really a rough constitutional equivalent of putting the federal power under provincial



trusteeship. The federal Parliament will not be able to pass legislation that is not regarded as attractive by the provinces, even in its own areas of jurisdiction. That again strikes at the very heart of our conception of a country that, yes, has provincial and regional interests, but a broad national interest that the central government is mandated to reconcile. One can say similar things about the spending power, the effect on the Charter of Rights, and so on. I will not belabour those points. You have heard testimony about them already.

I will say only one more thing before we move to any questions or discussion and that is really to heap, I guess, all the ridicule I can on the notion that has come out in some of these debates that while this deal is not perfect, let us pass it for now and then we can improve it and we can address these concerns in the next round.

Bearing in mind that in the next round every province will have an absolute veto, and that the status quo will be this transfer of power to the provinces and this creation of a distinct society in Quebec, can we with any semblance of credibility or intelligence say: "Yes, we can negotiate after and tidy that up. Quebec might agree after to circumscribe what "distinct society" means if we do not know now. The provinces will agree at some point to limit the veto power of the Senate that they will have the ability to create in a later round if they will not agree to it now. The provinces will later agree unanimously to strengthen the federal spending power."

I think we have to face up that once this is done, once this becomes law, there will be no possibility, unlike previous pendulum swings back and forth, for a reintegration or a restoration of essential federal powers if they are found to be lacking. Any constitutional change for which unanimity will be required will only be possible in one direction, and that is to transfer further power to the provinces, if there is to be any transfer at all. Recapturing the essential structures of national unity that we have had, if we let them go, will be impossible.

I guess all I can say, as one concerned citizen, is to literally plead with the members of this committee individually not to let it happen, to say: "No, it is not good enough. Yes, it was signed in good faith. Yes, the Premier made a commitment that he himself would not take an initiative to re-open this deal and make changes. But the Constitution does not belong to the Premier or to 10 Premiers and the Prime Minister. The Constitution belongs to the people of Canada and this just is not good enough and should not be allowed to happen."

End of formal remarks. I would be happy to discuss it in any way that you like.

Mr. Chairman: Thank you very much for a global look at the accord. It has been interesting for us, as we have gone through this process, that some people have tended to focus on particular parts and some have looked at the whole. I think that was a very full review of how you saw the intent and the end result. Sometimes when one is looking at individual parts, there is the old business of the trees and the forest. I think you have also underlined yet again the issues the committee is facing and is going to have to face at the end of its hearings.

I can only say on that that we are certainly trying to wrestle with those in terms of what we really do believe to be in the best interest. Needless to say, it has not been made as easy as it might have been, but that

is our task and we are going to have to wrestle with that. I think that was a very useful overview from that particular perspective and set out a number of the issues we can now follow up on with questions.

Mr. Allen: Let me echo the chairman's remarks for a very thoughtful presentation of the opposition case. It summons most of the central arguments, and though you did not touch upon the aboriginal or territorial issues, I can see where you would fit them in quite logically in your presentation.

Before I get to the central thrust of my question, perhaps you could clarify for me, once again, your proposition with respect to the Senate and the way in which the existing suspensive veto becomes an absolute veto in the course of the restructuring that Meech Lake implies.

Mr. Radwanski: No, there is not at present a suspensive veto except in the case of constitutional change. At present, with the exception that there is a constitutional change with a six-month suspensive veto, the Senate has an absolute veto. If it is not passed by the Senate, it does not become law. The Senate has not been using that with any regularity, partly, I guess, as a political matter, because there has been a feeling that it does not have the legitimacy to thwart the will of the elected representatives and that it is an outdated body and so forth. Having been given new life by a provincial appointment procedure or selection procedure, hence a renewed constitutional legitimacy, there is no reason on earth to assume that would not be used.

I think you need only look at traditional, log-rolling kinds of approaches and voting behaviour and so on to see that it would not be long before that evolved into a circumstance where what one province does not like will be opposed by the other provinces in exchange for it being done for them and so forth, but the absolute veto already exists.

Mr. Allen: Your argument is, essentially, that whereas now the restraint on the use of that veto is essentially a political one, a survival one as far as the Senate is concerned, because the federal government could initiate action to eliminate the power of the Senate under the new amending formula, with the Senate included in the unanimity principle regarding amendments of federal institutions, and the Senate being one, it would be impossible for that restraint to be exercised any longer and therefore the Senate would have a free-wheeling use of the veto power.

Mr. Radwanski: It would.

Mr. Allen: That is your essential argument, I gather.

Mr. Radwanski: It would. The intent of being provincially selected is to give the provinces a say at the heart of the federal system. Hence, it would be of explicit intent. Hence, it would be a veto power that is used for the purpose of advancing or protecting the perceived provincial interest against the federal power. That is why I say it is an effective form of provincial trusteeship over the federal government.

To analyse the absurdity of the concept, we need only ask ourselves what Ontario or any other province would say about a proposal that, in each province or in a province like Ontario, we create an upper House, a second chamber, selected by the federal government with absolute veto over legislation passed by our Legislature to ensure that the national interest is suitably reflected in everything we pass. Imagine what the provinces would say



if that proposition were ever put forward, and yet we are willing to do just that in the federal arena and thereby handcuff the federal government.

1050

Mr. Allen: The question I wanted to come to is that it often seems to me that in many of the presentations with regard to the overall thrust of the accord, there is a certain shading of perspective that seems to tilt things one way or another with regard to some central propositions in the accord. You have certainly taken the individual rights, charter-equality-provisions-base, constitutional-accord-of-1982 approach to the Meech Lake accord, and I understand that.

I submit that notwithstanding that, there did--at least the practice of two subsequent Quebec governments suggests there was a remaining outstanding agenda, not in terms of separatism per se, but in terms of a concept of federalism and a functioning of federalism on an ongoing basis. There appear, from the agenda of at least the 1970s and 1980s, even in the Trudeau years, to have been a number of outstanding items, pertaining to the recognition of some special role for Quebec vis-à-vis its own society, that remained unfilled and unresponded to. Whether that always showed up in polls, or what have you, it certainly kept recurring in our politics and it certainly recurred in the politics of Pierre Elliot Trudeau, who tried in the course of his years to wrestle that to the ground from time to time and in some cases, such as in the white paper of 1976, packaged a number of proposals that seemed to move in the direction the Meech Lake accord appears to move. You shake your head. It may not have been in total or cumulatively with the same impact.

Mr. Radwanski: Not even on a relatively similar order of magnitude.

Mr. Allen: But I want to submit to you that at the end of his era, he did not resolve the problem of the relationship between the rest of the country and Quebec, neither to affirm the distinct society, nor to give Quebec the power to promote that; I heard you using almost the same language when you said the possibility of remaining *maîtres chez nous* in the context of Canadian federation.

Notwithstanding the dualism built into section 2 of Meech Lake accord, with various provinces having responsibilities for maintaining, preserving, and protecting the dualistic structure of the nation, I cannot quite see how that departs so dramatically and so far from the notion of a nation in which the French people in Canada, with a *foyer principale* in Quebec, essentially have reasonable opportunities for maintaining their language, their culture, their society and feeling at home in the nation at large. In other words, after all the testimony, I do not personally share your conviction that the Meech Lake accord appears to move sensibly on to the separatist, ultimately two-nation, agenda. That appears to me what you are saying.

Mr. Radwanski: It is what I am saying, and I respond with some trepidation, in the sense that if all the testimony which has been before this committee has not persuaded you of that, I doubt I have the magic words that will. I will say the following. First of all, when you say there has been this constant theme in the Quebec Legislature, and among Quebec parties of an unresolved agenda and so forth, my answer to you is yes, and there always will be in the normal course of events.

With this accord, the theme would not disappear. The separatists and various nationalist elements in the Legislature denounced the accord, said it



does not solve the problem. The reality is that in a federal state there is a constant tension between centralists and provincialist forces. It is in the very nature of federalism, and of our system in particular, that there are constantly centrifugal forces that have to be resisted or the whole thing just flies apart. It is in the nature of the Quebec Legislature and to some degree we are seeing similar phenomena in other provinces--some of the the western governments, for instance--to seek maximum power for themselves.

I guess maybe in some ways it is in the nature of most legislative bodies to want as much power as they can have. To believe that with this accord we can end that and have everybody say, "Good, now we are satisfied," --not only do I not think that will happen, we have simply raised the plateau from which the demands will now depart and we have created circumstances where now people will say, "Well, if we are a distinct society we must be entitled to do this and that." And the debate will continue.

Now, if you say that agreeing to this distinct society simply gives Quebec some affirmation of things and so on, as I understood you to say, terrific. Let us define what it is we are acknowledging. Let us specifically get an understanding to which the Premier of Quebec and the Legislature of Quebec and those of the other provinces subscribe saying, "We recognize the distinctness of Quebec society as meaning the following and as not meaning these other things." If we can agree on that, terrific, let us enshrine it.

But let us not get ourselves into a kind of a mug's game where we say we agree to the distinct society concept and a bunch of premiers stand up in English Canada and say: "Not to worry, it does not mean very much. It is just a recognition of the status quo." That is sort of what you are saying. And meanwhile the Premier of Quebec stands up in Quebec and the federal government and the Lowell Murrys of this world stand up in Quebec and say: "We are giving you something new that you have never had before. Yes, it is invested with real meaning and real content. No, we do not want to talk right now about what that is because we might spook the anglos so let us keep it our cozy little secret for now."

You cannot do both. If you do both somebody is getting suckered to begin with. Secondly, it is either meaningless as I said before, in which case, why proceed? Or it is meaningful and if it is meaningful, by its nature it creates a dualism which runs counter to the whole spirit of Canada that we have had so far and a dualism that is dangerous, not because dualism in the abstract or in theory is a bad thing, but because the more and more that everything that is important to Quebecers is perceived to be in the ambit of the provincial government, the less relevant is the federal system and then it does not take great leaps of imagination to understand what happens.

If the "distinct society" is represented by the Quebec government and that is where all the tools are, the best Quebecers are not going to run federally. They are going to run provincially. The best bureaucrats are not going to be interested in going to the federal system in Quebec. They are going to go into the provincial system.

The result is that, not only is more and more concentrated in Quebec but the quality of Quebec representation in Ottawa diminishes. Hence the federal government becomes in some ways less responsive, less sensitive to what is going on in Quebec and to the needs of Quebecers. The cycle is reinforced. At some moment Quebecers say, "Well, we want this additional power". Somebody either says no or somebody says, "Go ahead and take it."

And at some further moment Quebecers end up saying--particularly when you look at the effects of free trade at the same time which moved the focus north-south instead of east-west--but at some point Quebecers say: "What the hell do we need this for? Why do we not go that extra step? The country has been irrelevant to us for the last 25 years."--I am talking maybe 25 or 50 years from now--"All the action is here and all the action is in our other relations. What do we need this for? Let us just go the rest of the way."

At that point nobody is going to be able to go into Quebec as was done in the referendum campaign and say, "But the whole country is yours, you do not want to walk away from all this." They'll say: "What are you talking about? We have not had much to do with that for the last 10 years" That is where what we decide today may mean that our children do not have a Canada and that is the direction of my analysis. I do not know that I can persuade anyone who has heard these arguments before and has not subscribed to them, but I can tell you that I believe it with every fibre of my being.

Mr. Allen: I guess it sounds to me like give them an inch and they will take a mile kind of argument.

Mr. Radwanski: No, no, I would not want it characterized that way. It says---

1100

Mr. Allen: Because I accept the tensions, I accept there to be ongoing struggle that will be part of federalism. I think that is not going to be overcome by the Meech Lake accord, and anybody who thinks that is the case, I agree with you, is living in a fools' paradise. But this deal tips that balance with regard to Quebec so severely that the train of events that you are projecting--let me ask you if you would try to give us your sense of a scenario that follows if we do not accept. Again, I am not particularly persuaded there is a doomsday scenario there, either. But obviously some events will follow and what will they be? We have not had Quebec at the table, although legally in the Constitution they should have been for a number of important decisions that have had to be made, not the least of which was the aboriginal rights question. What happens if politically in Quebec the accord is rejected? Do we then get a major provincial election called on that battleground? Where does that lead us? Does anybody down the road pull in their horns in Quebec from what is now the common agenda vis-à-vis what must be accomplished in constitutional reform? What happens in that context? Does that not lead to as dangerous and difficult a scenario for the re-emergence of separatism, as some people do say? What do you see as the alternative course, politics in Canada if the deal is rejected?

Mr. Radwanski: I see it as a fairly straightforward one. What happens if the deal is defeated? There will be a hell of a nasty editorial in Le Devoir, some nasty resolution in the Quebec Legislative Assembly--the National Assembly, as they choose to call it. The separatists try to walk both sides of that street, too and say, "Well, you see, it was a lousy deal which we opposed but those bad guys will not let us have it", which is an interesting posture, though not an unusual one for the separatist party. Then what happens? What happens is what happened when Mr. Bourassa scuttled the 1971 Victoria accord. There is a period of some disgruntlement though the mass of Quebecers will not take to the streets anymore than they did when this "imposition" of the 1982 Constitution took place; people shrugged and said, "Uh." Something roughly similar will happen.



Somebody will take an opinion poll in Quebec and it will show that 'X' per cent of Quebecers are upset that the Meech Lake accord did not pass. Bourassa will call himself an election on it and get a new mandate. Good for him if he does. It is another mandate that the separatists did not get. Does Parizeau fight an election to try to get some kind of mandate for greater separatism based on the failure of the Meech Lake accord? I mean, you can call an election but does he win that election because he wants greater separatism? I think Parizeau is a long way from winning elections at this point, and I do not think it will be that kind of outrage. What happens then? What happened after the failure of Victoria; we negotiate some more. It took 20 years to negotiate the Constitution of 1982, lots of false starts, lots of people disappointed, lots of people proclaiming the end of the world at every twist and turn. We are still here. The process will go on.

There will be disgruntlement, but I do not think we need to disrespect Quebecers to the point of saying that they cannot handle disappointment, that they are like little children and my God, if you disappoint them, they will run away. Nothing will happen, in a word, except the usual process of politics. And then eventually at some point, we will get a deal. Maybe there will be a reference to distinct society, but maybe we will understand what we all want it to mean. We will not reach a deal where we are saying: "Hey, let us give them a concession. We do not know what the hell we are conceding, but eventually we will all figure it out." Maybe there will be some restriction on the federal spending power, but we will all understand what is being restricted and why. Maybe we will find a different process for choosing Supreme Court justices, but maybe we will understand why we are choosing that process. Maybe we will work in some mechanism for resolving a deadlock so that we do not have a situation as we do under these rules where if a separatist government of Quebec put forward a blatant separatist or several blatant separatists as candidates for the Supreme Court and they were turned down, the Quebec government could literally claim there was no more Supreme Court because there is no deadlock resolution mechanism.

Maybe we will eventually do it right. That is really all that will happen. The world will not end. Canada will not fly apart. But what we will not have done is put into place something we ourselves do not damned well understand even as we putting it into place.

The fact that you can sit there, sir, and say with some great conviction what you think the accord means or does not mean, and I can sit here and say with equal conviction that it means something radically different, means it is bad law. You do not pass a law, let alone the fundamental law of the country, that is so unclear in intent, content and application that intelligent people of good conscience can reach totally different conclusions as to what the devil is being done. For that reason alone, one says, "Let's hold off until we know what we're doing." End of response.

Mr. Elliot: There are a couple of things I would like to discuss with you. One has to do with the appointment of the Supreme Court and the other has to do with the unanimity type of provision that is there in some of the things that have to be decided constitutionally beyond this point.

As a prelude to the comment I have to make: at this stage of our hearings, I think most of us, because of hearing in excess of 250 people or at least reading submissions from 250 groups or persons, are sort of framing up our point of view on the various points in the accord. We have a great deal of expert testimony before the committee at this point.



The kind of thing I would like to comment on with respect to both the appointment of the senators and the Supreme Court--I think you stated fairly explicitly that you felt the provinces would be in complete control of those two areas at this point, from the way you interpret the provisions of the accord. I submit, on the basis of testimony I have heard with respect to the Supreme Court, for example, that there is another point of view that might be looked at here. I would like you to comment a little bit further on this after I express a couple of points.

I think the fact that the Supreme Court appointments have to be made from provincial lists that are supplied is the reason you made the statement that the provinces would be controlling that. I submit that the federal authority does not necessarily need to lose anything by that kind of thing being involved. The Canadian Bar Association, for example, has come before us and has volunteered Canada-wide to really make the selection or have some input into the selection of the Supreme Court justices.

I submit that having lists supplied by the provinces might be just one of the things that are considered, with respect to the Supreme Court, to be in the best interests of Canada. The very best possible nine people should be sitting on the Supreme Court of Canada. I think the point of view with respect to that kind of thing in the accord has to be, in the context that we are Constitution-building here and a lot of things have happened very quickly, and in the context of the accord, that the kind of thing that has been suggested, that the provinces should have some more say and there should be a specific number of them from Quebec, is a very important consideration.

I submit that what this committee might be able to do beyond the hearings, at the point when we stop listening to people and start deliberating on what we have heard and make suggestions, is that with the Canadian Bar Association in, with the provincial submissions, with the federal people still assuming their true responsibility in this regard, that what might evolve might be a more powerful way of coming up with a much better Supreme Court than we have at the present time.

Mr. Radwanski: The only way I can respond is that one can always wish and one can always dream, but the reality of what is being put in that constitutional language, what is being put in the accord, is simply that the justices of the Supreme Court will be chosen exclusively from names put forward by provincial governments.

I come back to asking, first of all, what are we remedying? Is the Supreme Court not now functioning well? Is it unfair to the provinces? One can point to a whole lot of decisions that have been adverse to the federal government, including even the Supreme Court's ruling on the federal power to amend the Constitution. Latterly, you will recall that they really socked it to Trudeau with that "legal but unconventional" stuff. That certainly was not a federally biased judgement, so what are we fixing? That is the first question.

1110

Second, whatever the bar may volunteer to do, that is not being constitutionalized in any way. All that is being constitutionalized is that the federal appointment may come from nowhere except from names put forward by the provinces. It does not say how many names the provinces have to put forward and it provides no mechanism for resolving the situation that arises if the federal government does not like in the national interest the names put forward by the provinces.

In fact, one of the very interesting quirks, which I do not know if anybody has picked up on, in the wording of that whole Supreme Court section, and I commend it to your attention, is that when dealing with the part that has to do with Quebec, the language says, first, that the Supreme Court "shall" consist of nine justices, of whom three "shall be" from Quebec. It says that the three justices from Quebec "shall be" appointed by the federal government from names put forward only by the government of Quebec, but then it says that the government of Quebec, when a vacancy occurs in one of the Quebec seats, "may" put forward names of candidates: "may" not "shall."

Is that an accident of wording? I do not know. Is it profoundly meaningful? It sure as hell is. What it means is that the court shall consist of and hence the court does not exist unless there are three justices from Quebec, but if a name put forward by Quebec is turned down by the federal government, there is no requirement--because it is not a "shall," it is a "may"--that Quebec shall put forward names until somebody is chosen.

Parizeau could put forward Pierre-Marc Johnson as a candidate for the Supreme Court. The federal government says: "No, thank you. We are not going to put an avowed separatist on the Supreme Court." The government of Quebec says: "We put forward a name. We do not have to put forward anybody else. It is 'may.' But if you do not name him, the court does not consist of nine justices, of whom three are from Quebec. Therefore, there is no longer a Supreme Court until you name our choice." The bar association is not going to be able to help you. Nothing is going to be able to help you.

Take just that one example. Mr. Vander Zalm is going to take a justice to the Supreme Court. I do not care if he puts forward one name or five names, what are those justices going to be like and what is their orientation going to be? What is the bar going to be able to do about it? Who is asking the bar? You know, one can say, "Gee, in the best of all worlds, all kinds of misty things will take place." But when you are creating a Constitution, you look at the words you are putting on paper and you say, "What abuses is it open to and what consequences flow naturally?" and not "What other good things can we hope will happen?" because the good things may not happen and the worst may.

Mr. Elliot: By way of a supplementary comment with respect to that, and this leads right into the second point I want to make, I think if we take that attitude with respect to Constitution-building, we are not going to accomplish very much very quickly.

With respect to the unanimity part of it, the kind of thing that bothers me with respect to, out of hand, saying that the unanimity requirement is in those parts of the Constitution that require it, a lot of the things that would be negotiated among the provinces and the federal government do not require unanimity at all. The old amending formula would still hold there in all but 10 items, or maybe 11, depending on how you interpret the thing.

I submit that the attitude towards the negotiation with respect to unanimity has a lot to do with the success down the line. My background is education and I think from your background that an example I might use in the present context to get a focus on what I would like to emphasize here is that the classroom situation nowadays is quite different than what it was when I started 30 years ago in teaching.

I was pretty good at teaching mathematics, I think, up until last June. The reason I was good at it was that, unless you got unanimity in a classroom before you tried to teach them mathematics, you were not very successful in



getting the concepts through to the students in the class. When you are dealing with 34 or 35 young adults in a grade 9 or a grade 10 mathematics class, if you spend sufficient time at the beginning of a credit laying the ground rules on how you are going to go about teaching mathematics so that the behavioural problems and the other students who are necessarily part of every group you have in front of you now are all on side and you are going in a general direction, you are going to have some success at teaching mathematics.

I submit that we are breaking new ground in Constitution-building in Canada from this point on. I think the provincial premiers and the Prime Minister cannot any longer do the kind of thing that was perfectly legal up until now, to go into a room somewhere and come up with a constitutional amendment like the one that has been proposed by Meech Lake. I think what is going to have to happen is that they say, "In these areas, we need unanimity." If you are negotiating a constitutional amendment on the basis of the fact that unanimity is required, it is going to be a lot different than it is if you are aiming at getting seven provinces and 50 per cent of the population.

Mr. Radwanski: You are right.

Mr. Elliot: I submit that our Premier and our Prime Minister are reasonable people. If they go at it from the point of view of requiring the unanimity, they will probably come up with a reasonable approach to constitutional amendments when it is necessary.

I think society demands that out there now. If we revert to the old process which basically said, "Let's get seven provinces and 50 per cent of the population on side" and ram the thing through at the expense of the people who are against it, we are going to be in trouble.

Mr. Radwanski: But with all respect, I think you are missing the fundamental point. Unanimity is neither a good thing nor a bad thing in itself. To me, the fundamental point is this. If you want a Constitution that is close to set in stone, i.e., that it is going to be very hard to change, yes, nobody will be able to impose anything on anybody else and everybody has to agree. Unanimity is fine if you are happy with what you have got and you say, "Boy, unless everybody agrees, we don't want to move it another inch."

But if you start off with something that is very unclear in its meaning, in such a way that some people might be delighted with what it means--for instance, Quebec might be delighted if it turns out that the "distinct society" stuff or other provisions are interpreted by the courts, let us say, in a way that gives Quebec dramatic new powers and the others might be appalled--unanimity means that will never be changed.

If the Constitution operates in such a way that the restriction on the spending power is not a big problem for eight provinces but is really shafting two of the have-not provinces, for example, or any of them, it is going to be extremely difficult, as you yourself seem to acknowledge, to remedy the defect, because whoever likes what is happening because that province's interests happen to be served will veto a remedial change.

So what it says is, if we have a good Constitution, unanimity is fine, if it keeps anybody from ramming anything down anybody's throat, but if we have something that is unclear as to intent to begin with and hence subject to all kinds of problems, then unanimity means we cannot comfort ourselves that if it is not working as we hoped, it can always be fixed.

That is where your fundamental problem comes in. That terrifies me



because I do not believe you will ever get all 10 provinces and the federal government agreeing on anything that diminishes provincial power. Some province will always say, "Why should I give up this power?" That means that either you get no constitutional change or you can get unanimity only on those changes that increase power to the provinces if the federal government goes along.

1120

So that is my problem with this unanimity argument. It is not that, "Gee, we are all one big happy family and let us not do anything to anybody." It is that we risk locking in a deal that we ourselves do not understand right now, on which opinions differ, and if we discover, "Gee, that is not what we wanted it to mean after all," unanimity is going to prevent us from fixing it because whoever is getting what we did not expect them to get is not going to let us change it.

Mr. Elliot: I would like to thank you very much for your testimony here today because the kind of argument you put makes us consider seriously the kinds of things that we will have to address in the next month or so.

Mr. Radwanski: I hope so.

Mr. Elliot: Thank you very much.

Mr. Radwanski: Thank you for that. One worries, in hearing some of these questions being framed--I hope I am wrong--that they reflect a disposition to try to say, as the old Portuguese proverb has it: "The worst will not necessarily happen. Let us look on the bright side."

I am saying to you yet again, do not gamble with the future of Canada. If we cannot be sure of what it means send it back for a rework. When I was an editor, I would not have accepted a story that was ambiguous, where two people could read it and think that two different contradictory facts were stated. I would send it back and say: "Get your facts straight. Do it again. Get it clear. Let us make sure that at least we know what is being said before we present it to people." Surely that is the responsibility of the legislative scrutiny process.

Mr. Chairman: Just before turning to Mr. Pope, I will just note, in terms of the questioning, that I think at this point in the hearings what often happens is, depending on the point of view of the witness, one tests out some ??theories by coming from another direction. I just make that comment.

Mr. Radwanski: Sure.

Mr. Pope: I want to test out some of yours.

Mr. Chairman: Good.

Mr. Pope: As a matter of fact I understand the rationale of your argument and your concern that this accord could be the instrument for those who might want to undermine the national fabric.

I would like to understand better some of your assumptions behind that concern or rationale, specifically with respect to the Senate and the Supreme Court. You appear to be saying that the Meech Lake accord will lead to a process of proposing names for these appointments that will see provincial

governments testing either what principles of constitutional interpretation will be applied by prospective candidates or what principles of constitutional law or restriction on federal powers will be applied by candidates for senators' positions.

As you know, the federal and provincial governments both now make appointments. I am not aware of any process by which legal dicta or rationale or principles that would guide decision-making by these people are being vetted before names are proposed. I would like to know on what basis you think and what evidence you have that there will be that kind of process put into place as a result of Meech Lake. Is it clear to you and on what basis is it clear that the cabinet of Ontario, for instance, will only put forward nominees for the positions on the Supreme Court of Canada or the Senate on the basis of their attitudes vis-à-vis provincial powers as opposed to federal powers?

Mr. Radwanski: OK. There are two parts to the answer to that. The first part is that we are being presented with a departure from the status quo. Out of nowhere, all of a sudden, the provinces are being offered this power to put forward the names for the courts.

Mr. Pope: But you understand that even before, there was consultation between the provinces and the federal government?

Mr. Radwanski: There was consultation, yes. But now there is something much more than consultation. We have to look at the logic of the situation and ask: "Why is that being done in response to what wish? What is the nature of the gift to the provinces? What is the boon? What is the benefit?" One can be cynical, I suppose, and say it is nothing except patronage. The boon to the provinces is that they can appoint worn-out cabinet ministers to the Supreme Court to get rid of them.

Mr. Pope: I do not think I like the way this is heading.

Mr. Radwanski: I do not know that that would be a good thing. I doubt that is the intent. There must be some other advantage to provinces from, let us say, being able to put forward the Supreme Court names. You are quite right that, up until now, one can argue that the selection process has been relatively neutral in terms of those kinds of biases. I would not argue entirely, but relatively. The attempt has been made to find the best possible people, legal eminents, and so on, to sit on the national federal court.

Now we are saying that is not good enough any more. For some reason the locus has to shift to provincial selection. It is hard to understand that as being a meaningful benefit to the provinces. They are going to have to do all the work of screening the appointments; they are going to have to have a process, and they are going to get some people mad at them for not putting their names forward and all that. It is hard to imagine what the logic of the provinces wanting that is unless, generally speaking, they can use that to advance their own interests.

To be honest, in some ways I am less worried about Ontario in that regard because, historically, even though I am not sure that understanding has been reflected in the agreement to this accord, Ontario has always benefited from a strong central government. That in itself could give this committee pause, but that is another story. Other provinces have a much more centrifugal view, presumably. It takes no great legal scholarship to know which justices or which lawyers have an essentially provincial rights, decentralized,



"community of communities" view of Canada and which believe in a relatively strong central power.

A province that itself has centrifugal tendencies, a provincial government that really believes in an accrual of its own powers would be downright stupid to put forward justices who are going to rule against it. In that sense we are creating a new circumstance where, all of a sudden, something other than simple quality becomes a factor. Otherwise, why would you make the change, unless you can argue that the quality of the justices of the Supreme Court until now has been low? I have not seen that demonstration made, so why the change? Presumably to inject some other element, and it has to be an element of provincial orientation.

I think a similar argument can be made with regard to the Senate, and maybe even not by way of bias, maybe just by the nature of the process. Who is going to be provincially appointed to the Senate? Is it going to be that different from the current federal process? By and large, with some exceptions, people with links to the federal government in power are appointed to the Senate, whether you call it patronage or whether you call it a belief that people who think the way the government thinks are going to contribute to the national governments in the Senate.

By and large, people with links, whether it be former ministers or former advisers to a Premier or former or current fund-raisers for the provincial party, whoever, are going to be the ones put forward for the federal Senate provincially. The odds are that they will be people who think along the lines of the provincial government in power, who will represent and understand that they are going to the Senate to represent the provincial interest.

That is why the whole thing is being shifted around. It is a logical conclusion that their behaviour there will be as representatives of the provincial interest in the Senate. That is why we are having this change. I do not think it requires any assumption of machiavellianism or anything else, to say that if we are changing the way in which these people are chosen to let the provinces effectively choose them, it must be with a view to giving the provinces something, and quite explicitly that something is a greater say at the centre, a kind of a hold over the activities of the federal government.

Mr. Pope: I have a supplementary. I do not understand the assumption that, because the provinces will participate in the appointment of senators and Supreme Court nominees, they will participate on the basis of establishing a provincial orientation. I take at face value the assertion that what is wanted is that the province will participate in the development of these national institutions, and I cannot follow the jump from that position to this assertion that they will be presented by the provinces on the basis of a provincial orientation.

1130

In Ontario, the Attorney General seeks advice on appointments from something called the Judicial Council for Provincial Judges, and an Attorney General disagrees with the recommendations of the judicial council at his peril. I have never seen any evidence, having very briefly been Attorney General, that the kinds of questions asked of prospective candidates for appointment relate to constitutional interpretation, and I do not see that evidence at the federal level either.

Mr. Radwanski: You are right. That is what I am saying.



Mr. Pope: Why do you say it is going to happen?

Mr. Radwanski: Otherwise, why are we making the change?

Mr. Pope: Because the assertion has been made that the provinces will participate.

Mr. Radwanski: But why? What does "participate" mean? They are not going to participate if they are going to have the exclusive--

Mr. Pope: By nominating candidates.

Mr. Radwanski: The only candidates who can be considered are the ones they put forward.

Mr. Pope: But how do you jump from participation of the provinces to provincial orientation as a given?

Mr. Radwanski: Because I say why are we giving to them or why would they want it other than because of the advantages it could have?

Mr. Pope: How about because they want to participate, period?

Mr. Radwanski: What do you mean by "participate"? The government is not participating enough? It needs a few more chores?

Mr. Pope: Maybe that is their point of view.

Mr. Radwanski: I do not buy it. I do not think that would be the natural instinct. Certainly, if you look at Quebec--set aside the others for the moment--surely it is a stretch to think that the Quebec government is going to put forward a centralist for the Supreme Court given that the meaning or lack of meaning of that "distinct society" stuff, for instance, will depend on the rulings of the Supreme Court. Surely something more is involved there than a nice warm glow of participating.

Mr. Pope: So the assumption is it just seems logical to you that would happen?

Mr. Radwanski: Yes it does, and it seems to me inherent in the whole spirit of the offer that you guys can pick the Supreme Court. It is not because anybody grumbles at you that they do not like the Supreme Court's ruling on property law or what have you. It is to counter the grumbling there has been on occasion, although I do not think the evidence sustains it, that the Supreme Court is federally biased, so, by golly, you guys pick them and it will not be federally biased any more. You are right. You will make sure it is biased the other way.

Mrs. Fawcett: Am I right in assuming that you would gut the Meech Lake accord? Do you want to scrap it and start over? Would you be happy with amendments, or just which direction would you go there?

Mr. Radwanski: As a practical matter, it strikes me as extremely unlikely that a committee like this or any committee is going to simply pass a recommendation to forget the whole thing. I think a recommendation for major amendments would certainly have the effect of reopening it in a circumstance where all these laws could be considered. If you are asking me personally, I look at those provisions and every one of the central provisions to me is such

a botch in terms of, at best, lack of clarity, and in some instances simply lack of thought of the implications and consequences that, boy, it will take an awful lot of amending.

How do you amend the "distinct society" provisions? I guess you would have to amend them by defining what "distinct society" can permissibly mean and what it cannot. Do we then have a deal?

If Mr. Peterson is right that this does not give Quebec any new powers and does not change the status quo, then presumably yes, or presumably Quebec would not object. If Mr. Bourassa wants to stick to his guns and say that this gives them new powers, then obviously we do not have a deal. We circumscribe it very clearly and say it does not, or you specify what it can or cannot mean.

Likewise, the Supreme Court provisions if a change were recommended. To do what? To constitutionalize a role for the provinces in putting forward names or to create a circumstance where the provinces can put forward names, but if they are not acceptable to the federal government, then another process takes place. Parliament has the overriding authority or some impartial dispute resolution mechanism steps in. Do we still have a deal? If we do, that is very nice. If we do not, back to the drawing board.

I would recommend a drastic change to the Senate. Do you want to provincially select the Senate? I can see an argument for it. Then reduce all powers of the Senate to a six-month suspensive veto, subject to overriding by the elected representatives. If something is regarded as unpalatable to the provinces and you want the Senate to be able to hold it up for a sober second thought and provoke a national debate, terrific, but make sure they cannot handcuff the national government for ever. If that is accepted, do we have a deal? Maybe.

I would want to see drastic fundamental clarification on amendments in virtually each of the key provisions. Look at spending power. What do we mean by "national objectives"? Do you want to define that? If you can define it and still have a deal, terrific. Amend it to define it.

I guess I would say the responsibility of this committee is not to recommend passage of this thing with a sentence that each of you on the committee is not comfortable defending to your conscience, to history, to your children, 20 years from now. They say: "Geez, look at this mess. You voted for that thing?" If you are comfortable with every word and every sentence of that thing, then vote for passage. If you are not, recommend that it be changed or that that provision is unacceptable and I guess thereby do what you as representatives of the people are supposed to do for a Constitution that belongs to other people.

Mrs. Fawcett: I think constitutions are living things and they eventually have to change.

Mr. Radwanski: Sure.

Mrs. Fawcett: You are being so specific in so many areas where it has to be this before it should pass.

Mr. Radwanski: Because we are also talking about a process that strikes at the living character of the Constitution, as I said in response to Mr. Elliot before, by carving it in stone. That is one of my other problems with this whole deal. Historically, we had a pendulum swing in this country



between periods of considerable centralization and periods of considerable decentralization. We have been able to do both and we have had compensating mechanisms.

By creating this kind of a Constitution with all the flaws or potential flaws it has, say there is only a 50 per cent chance that the kind of concerns I am expressing are correct, but there is that 50 per cent chance and we have an amending formula that requires unanimity to change a comma in the essential provisions afterwards. It is not a living thing. It is a fossil that we are going to be saddled with and our children will be saddled with, come what may, because you will not get unanimity if some provision serves the interests of one or more provinces but does not serve the national interest. You are right. A Constitution is a living thing. For Christ's sake, let us not kill it.

Mr. Chairman: Thank you very much. I was thinking that I would say thank you very much at the end, and as you kept building and I saw my children, my grandchildren, my great-grandchildren and my great-great-grandchildren, I began to feel, why did I do this last September 10? None the less, you remind us, and I think quite properly and quite rightly, of what it is we are doing.

I suppose we are wrestling with a number of things, including, and I think with reason, not just the accord itself, but where do we go after that? I think we also have a responsibility not only to the particular person who lives at the end of the second floor in the east end of the building in that regard but also, in a sense, to the country.

One of the things that is fascinating about the process we have gotten into here is that whether Meech goes through or not, in terms of future constitutional amendments, provincial legislatures are going to have a role somehow, and I hope a role which is going to be one before things are signed, but there is going to be a role in this. I think we have recognized that one of the inherent problems is that we are a group of individuals who are elected within a provincial framework but we are really dealing with national issues and whether we are here in Ontario, Saskatchewan or Newfoundland, we are going to have to find ways of understanding that national perspective as part of our provincial function, if you like.

It is a kind of side-effect that I found of interest, as we sit here, not to be just looking at this as, "Is it good for Ontario?" and what that perspective is, but by the same token trying to differentiate what is often a criticism of Ontario from the west, from Quebec and the east, "You Ontarians tend to confuse yourselves with the national view or the national government."

That is a reflection on the comments you have been making, which I think are ones that do focus us on the totality of the accord. They are issues that certainly have arisen, that we are grappling with and that we are going to have to come to some determination about at some point over the next several months.

On behalf of the committee, thank you for putting us on the spot but in a very full way and in a very articulate way that does nail down some of those thematic questions we have to think about. I appreciate the opportunity to exchange some thoughts on that. Thank you for coming.

Mr. Radwanski: Thank you very much.

Mr. Chairman: The committee will adjourn until 3:30, when we will come back here. Our second witness was unable to be with us this morning.

The committee recessed at 11:43 a.m.



CAZAM

XL2

-87052

C-23b

(Printed as C-23)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 6, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)  
VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)  
Allen, Richard (Hamilton West NDP)  
Breaugh, Michael J. (Oshawa NDP)  
Cordiano, Joseph (Lawrence L)  
Elliot, R. Walter (Halton North L)  
Eves, Ernie L. (Parry Sound PC)  
Fawcett, Joan M. (Northumberland L)  
Harris, Michael D. (Nipissing PC)  
Morin, Gilles E. (Carleton East L)  
Offer, Steven (Mississauga North L)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From New Experiences for Refugee Women:

Dobbin, Doris, Outreach Co-ordinator and Volunteer Co-ordinator

From the Women's Legal Education and Action Fund:

Arsenault, Denise, Vice-Chair

Jefferson, Christie, Executive Director

Atcheson, Beth, Past Vice-Chair

From the Toronto Area Caucus of Women and the Law:

Tellier, Nicole

Vella, Susan M.

Rosen, Melissa

From the Young Women's Christian Association of Metropolitan Toronto:

Karn, Luanne, Social Action Co-ordinator

McKay-Comparey, Micheline, Social Action Committee

Campbell, Ellen, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 6, 1988

The committee met at 3:30 p.m. in committee room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good afternoon. I would invite Doris Dobbin of the New Experiences for Refugee Women, if she would be good enough to come forward and please take a chair. We want to thank you very much for coming this afternoon and joining us. I think I will simply ask you to proceed with your comments and we will follow that up with a period of questions.

NEW EXPERIENCES FOR REFUGEE WOMEN

Mrs. Dobbin: I guess I am supposed to say at the beginning that I hope your questions are not too tough, because I do not know too much about constitutions.

Mr. Chairman: Apart from having sat and learned a lot over the last little while, we are by no means experts. I think you are going to bring a focus on the subject that will certainly be more than we have, so we appreciate your being here.

Mrs. Dobbin: OK. My name is Doris Dobbin and I work at New Experiences for Refugee Women. I would just like to let you know about our program briefly so you will know what I am doing.

New Experiences for Refugee Women is a nongovernment organization working with women from Latin America who have come to Canada as refugees. Our primary objective is to promote the social, cultural and economic integration of refugee women into Canada's multicultural society. We offer a six-month training program that consists of orientation and information, employment preparation and counselling, on-the-job training and English as a second language. The women have arrived in Canada either as government-sponsored refugees, as private or church-sponsored refugees, as asylum seekers or as part of the family reunification program.

We have many concerns about the Meech Lake accord, but there are some points which our organization feels are of major importance to the women we serve.

First, the effect of this accord on refugees: We are concerned with the effect the Meech Lake accord will have on refugees, who have the least rights of any people in the whole world. Many have no country to call home, even if they are allowed to remain within the country to which they arrived seeking asylum or to be resettled.

Canada has a long and well-deserved international reputation as a world leader in the humane and effective treatment of refugees. Refugees are living proof of the worldwide struggle for human rights which we in Canada often take very much for granted. But an affirmation of the inalienable rights of the individual in the form of our Charter of Rights and Freedoms is at the very backbone of our Constitution. We see the Meech Lake accord as it now reads as



a step backwards, a step which will take away some of those basic rights from people who had already been stripped of them before they arrived in Canada and who turned to Canada to gain them back.

In terms of refugee claimants, the present refugee determination procedure is long and cumbersome. Delays of months or years will be added to it if this part of the accord is not worked out clearly and humanely. Will the refugee determination be made by the federal government or the provinces? If the federal government continues to make the determination, which province will he or she be allowed to live in, since the provincial governments have the right to choose which immigrants and refugees come into their province?

What about refugees who are selected abroad? Provinces will be allowed to participate in this selection, but what will this mean for those refugees waiting in refugee camps, some for many years? Will they have to apply to all 10 provinces or choose which province they would prefer? Will each province have representatives overseas interviewing refugees? How will refugees know which province is likely to accept them? Would selection be based on race, on potential to settle or what? Once they are accepted by one province, will they be forced to live only in that province once they arrive? The selection process, as with the determination process, will be slowed down because of this two-tiered federal-provincial system.

What about refugees coming to Canada through the family reunification program, which the federal government has stated is the backbone of its immigration policy? If a refugee who wants to sponsor his or her family happens to live in a province which has filled its quota for refugee intake, does the person have to wait until the following year to sponsor the family, even if the province next door is still accepting refugees?

Services to refugees once they arrive: In regard to services to refugees, we have great concerns regarding the fact that the provinces will be able to opt out of shared-cost programs. There is no requirement, as I understand, in relation to immigration settlement and reception services, that the provinces carry on a program or initiative which is compatible with the national objectives. Why are there no imposed standards in these areas?

The quality and quantity of services and programs will differ from region to region. If a refugee settles in Ontario, I can assure you that the type and quality of services offered to him or her will be quite different than in another province where there is already a negative attitude towards refugees. Settlement agencies in some other provinces are very worried that their provincial governments will be irresponsible in their response.

Even if there were imposed national objectives in regard to the treatment of refugees, what would they be based on? The objectives which would be agreed upon by all provinces? As was mentioned by another organization, would this mean the lowest common denominator for provincial compliance?

Because we work with refugee women, we feel they will be in double jeopardy if the accord is passed in its present form: first, because of the points mentioned above, and second, because they are women. As I am sure people have mentioned to you already, the accord expressly states that there is protection for some charter rights. What about those rights which are not mentioned? Why not delete section 16?

Presently, a group of organizations is putting together a charter challenge to Employment and Immigration Canada's subsidized language training

program. Women have been left out of the program for a variety of reasons. They have not been allowed what we believe to be also a basic human right: the right to communicate. Can you understand the frustration of a mother whose children speak only English or French and who does not understand them, nor is she able to speak with them?

The accord, as it reads, will make the lives of refugee women even harder than they are now. Will we live up to our international obligations if refugee women find life in Canada even more difficult?

In conclusion, as an organization which has been involved in the process the federal government used to introduce refugee legislation, we were upset by that process. How the Meech Lake accord has been introduced to Canadians is also upsetting to us. Governments must listen to the people of Canada. If women are saying there will be problems for us with the present version of the accord, the government should really listen. If refugees are saying there will be problems for them with the present version of the accord, the government should really listen. The accord is meant to enhance the lives of those living in Canada, no matter what their gender or immigration classification.

We ask you to listen to us, because we know the effects of government policies on our day-to-day lives and on the lives of those with whom we work. We ask Premier Peterson not to accept the accord without clear, meaningful and humane amendments.

Mr. Chairman: Thank you very much for zeroing in on a particular area--in fact, I suppose really two: the shared-cost programs as well as the question of refugees. We did have, I think some four or five weeks ago, another organization which appeared in London from Kitchener-Waterloo, I think, with the Kitchener Young Men's Christian Association, which expressed a number of similar concerns around the same issue. I think you have underlined some of those as well, and we can follow that up with some questions now.

Mr. Harris: You talked about the national cost-shared programs. There are really two things. You were talking about services for immigrants. When we have been talking about national cost-shared programs, we have been talking programs, I think, other than services for immigrants. I assume you are talking more about the opting out, where, as I understand the agreement, it would allow Quebec--and any other province, by the way, who could work out a deal--to deliver the orientation, if you like, or whatever services are going to be delivered, and the federal government would pay for them. That is the part you are concerned about--

Mrs. Dobbin: Yes.

Mr. Harris: --more so than the other clause that deals with national objectives and cost-shared programs, I presume.

1540

Mrs. Dobbin: I am concerned about the national objectives too, because if they are not clearly stated in terms of--I mean, I am being fairly specific about refugees, and immigrants as well, but certainly with refugees, if they do not have these clearly defined national objectives, then any province could say it is providing that service, because it is a sort of a wishy-washy wording or something.

Mr. Harris: I disagree with those who say that. I cannot imagine that the federal government, if its funding and that whole process is conditional on the province's meeting national objectives--if I am the federal government and I am coming out with a new federal program, included in the program are going to be the national objectives. I would say, "Here's my program to do X, A, B, C and here are the national objectives of this program, 1, 2, 3, 4, 5." I think they will spell it out very specifically for that program. Then I would think that the province will have to demonstrate to the satisfaction of the federal government, obviously, and eventually, if there is a dispute, to a court, that in fact it is meeting these national objectives or the intent of them or whatever. I am not so worried about that.

I am worried, though, about what you raised on standards, if you like, vis-à-vis immigrant services and what is going to be provided. The Premier (Mr. Peterson) of this province says: "All we've done in Meech is put into the Constitution what is already the practice. It is the Cullen-Couture agreement," or whatever it is, "and it has been used now for years."

I want to know, first, if you agree with that, and second, have you had any problems in the last few years, because we are now constitutionalizing, according to the Premier of this province, what in fact has been going on for the last number of years with Quebec.

Mrs. Dobbin: With Quebec. Well, I do not know if I can completely answer that. First of all, on the first part of your statement, I still do have concerns about what you said. I think right now the federal government has a policy about how to deal with refugees, and I can assure you that, depending on which office in Toronto you are in, the treatment of refugees is different; depending on which city you are in, the treatment is different, and certainly depending on the province that you are in, it is already slightly different.

Mr. Harris: Yes.

Mrs. Dobbin: It is the same with, for instance, the welfare system, although the federal government does give a certain amount. I believe they pay half the costs of refugees who are receiving welfare. If you happen to be a refugee who lands in British Columbia, you do not get that welfare until a certain point, whereas Ontario has been very generous in allowing them to get on to welfare immediately.

So I am really concerned that if everything is put into the hands of the provinces and that is what they are doing already with--and maybe I should not get into federal politics or something now--but with having to deal with the services to refugees and the way the whole treatment of refugees has been over the last few years, I am very concerned with what the federal government will say the national objectives are and how it will word them. I do not think they are always as clear as you are saying they would be.

Mr. Harris: I do not want to debate that. We are going to hear lots of opinion on it. I tend to hear you saying, "We're not happy with what the feds do." Maybe you should leave it to the provinces then. Maybe they will do a better job.

Mrs. Dobbin: Well, maybe. This one might.

Mr. Harris: Let us not engage in that debate, though.



The Cullen-Couture agreement, which now, I understand, allows Quebec to have a say in who will immigrate into Quebec, I am told, including the five per cent, is already in place. Has that caused you a problem or any--

Mrs. Dobbin: The five per cent? Sorry, I did not hear you.

Mr. Harris: They are entitled to their share of the population plus five per cent. I am told that is no different from what has happened over the last 10 years.

Mrs. Dobbin: I do not know how it affects Quebec. Ontario itself has about half of the refugees who come into the country.

I do not think I understand quite what you are asking.

Mr. Harris: You do not like Meech. The Premier of this province says Meech--

Mrs. Dobbin: It is the same as before.

Mr. Harris: --is the same thing as what we have been doing for the last 10 years, so what do you not like? That is all I am asking.

Mrs. Dobbin: I think it is the transfer of power, to start with. Certainly in terms of selection of refugees, the determination of refugees, I do not think that is spelled out in the accord at all.

Mr. Harris: I do not know whether the Premier is right or not. I have problems, by the way, and I am not trying to ask you difficult questions. This is one section that has caused my party problems right from the very beginning, and I still have problems.

When we asked the Premier these questions, he said: "That's the deal now. That's the deal that Quebec has with the federal government, so there is no change. We are just constitutionalizing it."

Mrs. Dobbin: And each province will have that deal.

Mr. Harris: Each province has the option of having it, but the Premier says we have the option of doing that now.

Mrs. Dobbin: If they have, I do not believe they do that.

Mr. Harris: Right.

Mrs. Dobbin: Quebec has quite a different way of dealing with refugees than the rest of Canada.

Mr. Chairman: Just for the record, there are six agreements, but Ontario has not entered into any formal agreement with Ottawa.

Mr. Harris: So the Premier is saying there is nothing to have stopped us from entering into an agreement now, or Meech is saying we can enter into one. It is the constitutionalizing of what has been practised in Canada.

Mrs. Dobbin: Yes, but I am concerned with how that will be entered into, not so much whether--because it is going to be a little bit different power, I think, later than we see now.

Mr. Harris: OK.

Mr. Allen: I want to say the spirit of my questions is precisely that of Mr. Harris's questions. I am not going to ask you questions to try to make it difficult for you, but just simply because we have a big problem on our hands.

Mrs. Dobbin: Yes.

Mr. Allen: We are trying to pick people's brains as best we can.

Your last response is where I want to take off from. You said you were concerned with how it would be done, not whether it could be done. Could I just ask you whether you think the "how" really can be written properly into a Constitution? As you know, our Constitution sets out a lot of things that the provinces have responsibility for and the federal government has responsibility for. It lists all those items, and it is everything from the census and statistics to sea coast and inland fisheries, weights and measures for the federal government and the province, the establishment of 10-year provincial offices and the payment of provincial officers and the establishment of hospitals, asylums, charities. But none of that in our Constitution tells us how those things are to be done. That is the political task, after you decide who has responsibility for doing what.

The problem of the Constitution, then as now, is to decide who has responsibility for what and under what sort of broad rules, which we have tried to establish in the charter, we can provide grounds for appeal in terms of the principle of the way in which they are applied. None of that gets into the exact mechanics of how it is done and whether one province is going to be slightly fairer or better than another, etc., or whether the federal government is superior or not. Are you aware that that is the way the Constitution functions? That is the first question, I guess.

Mrs. Dobbin: Yes. Then the procedures are written on how--

Mr. Allen: Some things are political and some are constitutional.

Mrs. Dobbin: Yes.

Mr. Allen: So we have to work with that.

Second, do I gather that you are not satisfied with the section on immigration even though it does say that there will be national, overriding objectives and standards, and obviously those will include international treaties with regard to the acceptance and treatment of refugees? It does specifically affirm that the Charter of Rights shall govern everything that is done in the arena of immigration. Notwithstanding all those, you still have a problem.

Mrs. Dobbin: Yes, I do, because at the moment, that is how the Constitution reads; the country as a whole has these rights and obligations. As I said a minute ago, if you go from one part of the country to the other, how refugees are being treated in each province is quite different, and some of them do not measure up to what we have set as our national objectives.

Mr. Allen: Perhaps if I could just interrupt you at that point, though, you see, at the present time, there is nothing in our Constitution that says that one level of jurisdiction is, in fact, superior to the other.

The federal government could not now appeal to the Constitution and say, "We have a prior right to determine what you do in the provinces." It says it is a shared jurisdiction. There is nothing about anybody's being superior to anybody else.

What Meech Lake does is say that there shall be national overriding objectives, that the charter shall apply and that nothing, either provincial or federal, shall breach those considerations. My sense is, and I want you to respond to this, that is much stronger in terms of federal control than we presently have in the Constitution of Canada. Yes? No?

1550

Mrs. Dobbin: I still feel the refugee policy is part of the whole immigration umbrella. I think there is going to be some watering down of that somehow when the provinces individually take over parts of that whole immigration umbrella. Yes, maybe the federal government will decide we will take so many refugees in one year or we will do the determination, but I still have really a hard time understanding how the Meech Lake accord assists the provinces, or Canada as a whole, to deal with that in such a fragmented way.

For instance, what if the provinces decide that they will take so many immigrants per year? As it stands now the refugees are part of the immigration levels; they are not in addition to what the government has already set as levels. There are maybe 20,000 refugees included in the immigration levels. As I said earlier, how are the provinces going to decide who they are getting? I do not know how this is all going to assist them in deciding that.

You are right; those are the technicalities of it all, but if the tone is not set properly, then the technicalities will really hurt a lot of people's lives.

Mr. Allen: Technicalities always can. That is true.

Mrs. Dobbin: But that is what we live with and that is what I said at the end.

Mr. Allen: But as you said yourself--

Mrs. Dobbin: Yes, if they are not more specific with the objectives, so that people do not have any question about them and do not misunderstand them, they will hurt those of us who have to live every day with what these policies are and what the Constitution is. The Constitution has been good for a lot of people, including refugees. I do not think we want to lose that and all of a sudden make things a little bit confusing so we have to decide and debate whether this is correct or that is correct. People's lives are at stake when we are talking about refugees. It is not how many fish we are going to get this year. Yes, that is important too.

Mr. Allen: I certainly can see the importance of all of your concerns, both in principle and in fact. I do not have any problem with that at all. I am still wrestling with where the primacy lies and whether you are not much stronger with Meech Lake, which says the charter quite clearly must apply to all immigration decisions. That gives you a lot of appealing power in the courts.

Mr. Offer: Thank you very much for your presentation. You have raised some very important issues. I think your last comment, with respect to



how it might impact on people's lives today, immediately, is extremely important for us to appreciate. As the hearings have gone on, and the chairman has already alluded to a particular presentation in London, that has been brought home. You have once more, very importantly, done so also.

I am having some problems in that your concern with the accord seems to be not so much a concern with what is in the accord and the view that the accord, as part of the Constitution, might set a particular framework of understanding of a relationship between the federal and provincial governments, but rather how the particular participants, the federal and provincial governments, will use that framework in dealing with policies today and in the future.

My problem is that this is something which will come up in terms of policies, politics and issues, and I guess I do not see it as part of the Constitution. I see the framework, and I think we have that in the accord. I think Mr. Harris and Mr. Allen, as I interpreted them, were saying basically the same thing, that it is a framework and that in addition to the framework there is some very specific protection surrounding the whole question of the immigration items in the accord.

Having said that, my question is this: In response to some questions today, you have raised the whole question with respect to refugee service and your concern with respect to refugee service. I am wondering if you can tell us what that service is now and how you believe it would be impacted upon by this particular accord. I think that is where your major objection is to the accord.

Mrs. Dobbin: At the present time, as I said, Quebec has a certain way of dealing with refugees, but the rest of the country does not, despite the fact there is a national policy on refugees and supposedly national ideas about how to treat them.

A small example of one service they have would be working with refugee minors, who would be children who come here and have no family with them. Presently the rest of Canada, as far as I understand, just turns these children over to children's aid or to anyone whose phone number they have, whereas in Quebec if children under the age of 16 come in, they have a house set up for them, they start English classes in that house, they begin to give them orientation and adaptation classes right there in the home until they find a Canadian family which then can look after them. I think they are there for about three months. Nowhere else in Canada do I know of a government doing that kind of service. That is one of my concerns. Even something as basic to me as the care of children has to rely on the goodwill, I guess, or the attitude of that province at the time.

Mr. Offer: In response to that, here you are using the government of Quebec as an example for all the other provinces to follow because of the service which it provides in that respect. I am wondering if it could be argued that this accord would allow organizations such as yours, and others, to lobby provincial governments now because of the accord, which has brought out in a very clear sense the right of a province to have this type of agreement, to say, "We want you to follow this particular model," so that particular service, which is now only in Quebec, could be found in other provinces. I am just wondering how you would react to the argument that says the accord is proper for the very reason that you are concerned about it.

Mrs. Dobbin: In my experience with refugee work, refugees are not exactly a popular issue. Governments do not exactly think that they can always

get points. I hate to be so much this way, but I am afraid this is what has been happening. Refugees, as I said in my speech here, have the least amount of rights of anybody. They do not have a lobby except for individuals like us who are trying to do that. For us to try to force a government to do something like that--we have been trying to get the federal government to do that for some time, to respond to some very human issues. I feel that there are some provinces right now that are even less likely to respond than even the federal government is doing. I am not sure where Quebec's attitude comes from. I have not studied that. I have not studied its government in terms of why it does these things, but the rest of Canada could do something. Even Ontario could provide the service for young people. Any province could do that right now and they are not doing it. Why not? Why would be they more likely to do it just because now they have a little more right or power to do it?

Mr. Offer: That very reason, possibly.

1600

Mrs. Dobbin: When you are dealing with something very--what is the word?--humane, or something, as children, I do not think that you have to wait to get the power to do it before you do it. These are children. This is one example.

Mr. Offer: No one is going to question the necessity for the service. No one is going to question the ongoing analysis of the service to make certain that it continues to meet particular needs. I do not think anyone is ever going to question that. I am going to go back and say that I see this accord as allowing groups, again, such as yourselves, to throw the ball to the province and say, "Listen, the accord now says that you can enter into these agreements."

Mrs. Dobbin: You can enter--not that you must enter into them, not that you must do something about it, but you can if you want to.

Mr. Offer: And that is extremely important. Now the provinces will have that responsibility or obligation to meet that very crucial issue. I know you and I could probably discuss this all day, but I just want to thank you very much for the presentation. It is a very important point, especially dealing with the refugee service and some of the very important issues within the service, which it must address.

Mrs. Dobbin: As I said, maybe I am not very well versed in being able to express it, but I want you to think about this aspect of it.

Mr. Chairman: Some of the testimony we have received on some other issues and even, as we have learned today and from the Kitchener-Waterloo organization in London, on some aspects about the overall treatment of refugees, whether we were talking about Meech Lake or not, raises a number of questions about what is happening now, regardless of whether we were talking about constitutional change or not.

Certainly for me, and I suspect for many members of the committee, you have underlined some of the points and some of the problems; for example, I was completely ignorant of the treatment of refugee children in terms of just what happens. I think this is testimony which we would want to pass on to some of our colleagues who have some responsibilities there, because I think you are quite right that there is a problem. In many of those areas it may not even be necessarily clear who has the responsibility, and sometimes it is where the political will is; then something can go ahead.

Mrs. Dobbin: It is that juggling of who has got the responsibility that is very alarming. People are in the middle while you are deciding who is in charge.

Mr. Chairman: When these questions came up before, I dug in to try to find out a bit more about what the immigration sections might mean, and there was one interesting thing here that I think is better than the current situation. This comes back as well to Mr. Harris's question.

Right now the agreement that the federal government has with the different provinces is a sort of governmental agreement that they worked out. The one thing that I think is a step forward here is that any agreement that is worked out would have to be passed by the House of Commons and the Senate. The one thing that does mean is, then, that would provide for more public input, in effect. Certainly it would provide those organizations that are involved with immigrants and with refugees, through either the House of Commons committee or whatever mechanism was set up, with an opportunity to go into a lot of these particular issues.

Whether Meech Lake goes ahead or not, that is one component that might be of interest to groups that are active to get it from being more of a closed shop, government-to-government negotiation and into, in this case, the House of Commons, where finally they would have to approve a certain arrangement which, because of the public debate and so on, would be much clearer, in terms of numbers, how different programs were going to be done. That is not so much a comment directed to Meech Lake as it is to a general approach to a given with these issues, because I think, as you point out, sometimes people tend to want to put refugees off to the side or not have to think about them.

I want to thank you very much for coming this afternoon. I think that, contrary to what you said at the beginning, having people who are directly involved in these kinds of programs, believe me, there is an expertise there that we certainly do not possess and we appreciate your comments.

I call upon the representatives of the Women's Legal Education and Action Fund, I guess more popularly known as LEAF: Beth Atcheson, the past vice-chair; Denise Arsenault, the vice-chair; and Christie Jefferson, the executive director.

Welcome. Some of us had the opportunity to attend a conference with Ms. Jefferson earlier in March. It is nice to see you again. We have also chatted with Ms. Atcheson on a number of occasions. We welcome you here this afternoon. To maximize our time, if I can turn the mike over to you, please go ahead with your presentation and we will follow up with questions.

#### WOMEN'S LEGAL EDUCATION AND ACTION FUND

Ms. Arsenault: We, the representatives of the Women's Legal Education and Action Fund, are pleased to appear before you today to speak to why our experience with the development of equality rights for Canadian women convinces us, and should convince you, that amendments to the Meech Lake constitutional accord are essential.

I am Denise Arsenault and I am the current vice-chair of LEAF. Contrary to what many people assume, I am not a lawyer; I am a chartered accountant by profession. I am involved in LEAF because I dearly want to see the end of sex discrimination in Canadian society. Today I will provide you with some background information about LEAF.



To my right is Christie Jefferson, who is LEAF's executive director. Ms. Jefferson has a long history of working with disadvantaged groups. She has been the executive director of Opportunity for Advancement and of the Canadian Association of Elizabeth Fry Societies. Ms. Jefferson will address the issue of equality rights in the charter and equality litigation.

Finally, on my left is Beth Atchison, who is a lawyer. She is the former vice-chair of LEAF and co-chair of our Meech Lake committee. Ms. Atchison will explain why LEAF has very serious concerns about the accord's impact on equality rights and will present LEAF's recommendations to you.

Our presentation will take about 15 minutes and we would be happy to respond to any questions from you following our presentation. We will leave you with copies of LEAF's most current litigation report at the end of our presentation as well.

LEAF was founded in April 1985, and one of LEAF's primary objectives is to achieve equality for women by means of litigation, using the guarantees of the Canadian Charter of Rights and Freedoms. LEAF is governed by a national board and includes at least one representative from every province and territory in Canada.

In our view, LEAF is uniquely qualified to put before you the issues which I have outlined. Our qualifications can be demonstrated by reference to the criteria LEAF uses in the selection of test cases which it supports. In particular, LEAF's cases must substantially promote equality for women. In addition, the case must be of importance to women. Ideally, a LEAF case would result in significant gains for women or in gains for a significant number of women.

Since LEAF began operation, it has opened over 250 files. The inquiries cover a very broad range of areas of law. To date, LEAF has adopted 53 cases. We have appeared in cases in superior trials in the Courts of Appeal in 10 of the 12 provinces and territories and in the Federal Court of Canada. Also, we have been granted intervenor status in five major equality cases before the Supreme Court of Canada.

The Ontario government already knows and supports LEAF's work. On October 16, 1985, the Ontario government made available to LEAF a fund of \$1 million to finance equality litigation for Ontario women. We are very grateful for that support.

Our experience in the development of our cases has demonstrated the desirability of a very wide consultation process. LEAF therefore consults with community groups concerned with specific subject matters in a particular case, as well as with experts in the theory of equality in the substantive areas of the law and in other disciplines such as sociology and economics. LEAF operates this way because the reality is that equality issues are theoretically and practically complex.

Many communities share an interest in any one issue, and it is very difficult to correct mistakes once a case is before the courts. Developing case strategy requires a sure vision about the meaning of equality and how that vision should be made concrete in any particular instance. In LEAF's experience, that vision cannot be arrived at in isolation; hence our participative approach to case development.

The way in which the accord was drafted and publicly presented, and probably negotiated, suggests that these realities were ignored. Our first ministers indulged in the conventional exercise of adjusting federal and provincial powers in a way to achieve what the honourable Senator Lowell Murray has called equality of the provinces, not simply the entry of Quebec into our constitutional family, as is often stated.

Apart from the broader political debate as to whether the accord overall is desirable, the Constitution is no longer a matter of the distribution of decision-making power nor is it the sole preserve of first ministers.

I would like to turn it over to Christie Jefferson now.

Ms. Jefferson: It is a pleasure to be here. It is nice to see you again, Mr. Beer. We should stop meeting this way.

Mr. Chairman: It is on other issues, though.

Ms. Jefferson: That is right, a change of pace.

I am going to spend, hopefully, five to six minutes dealing with the issue of equality rights in the charter in a general sense. For simplicity's sake, it may be useful to divide the development of women's rights into three broad phases of evolution.

The first phase was the struggle for formal legal equality between men and women, that is, removal of any common-law or statutory distinction between men and women. The results of this, of course, were women getting the right to vote, to hold public office, to participate in the professions, to hold property and the right to equal custody and guardianship of their children.

For some people, this apparent gender neutrality is still viewed as the meaning of equality, and we will be talking a bit more about this in a moment. This is an important issue because, however the achievement of formal equality, it can obscure the fact that women as a group are still profoundly disadvantaged in Canadian society. I am sure, for example, I need not remind the Legislature of Ontario that poverty has a female face, both in this province and in Canada as a whole.

The second phase of reform was the struggle for equal opportunity as protected under federal and provincial antidiscrimination codes. These codes are directed towards individual instances of discrimination and have really not proved themselves to be very useful in seeking broader redress or the deeply rooted and pervasive factors in society which cause women's inequality.

In 1982, of course, on the proclamation of the Constitution, we entered our third phase, which is the struggle for substantive constitutional equality rights. Given the enhanced role of the courts in this third phase, women prepared for constitutional litigation, and our organization was founded. It is our hope that the equality guarantees of the Charter of Rights and Freedoms, specifically sections 15 and 28, will provide the foundation for achieving substantive equality for women as a group through tackling systemic discrimination. We are at a crossroads in this most recent and, hopefully, final phase of the development of women's equality.

Section 15, as you all know, is only three years old. What is perhaps less known is that the very first section 15 case has only been heard by the Supreme Court of Canada as recently as October of last year. There are a

number of cases in lower courts. However, the vast majority of cases in the lower courts do not involve equality cases; they involve other charter areas. Of those which are using section 15, the majority are not focusing on women or other disadvantaged groups and the interests of those groups. In fact, a number of these cases threaten the very few gains women have made through our earlier phases of reform, such as maternity benefits and rape shield legislation.

The Supreme Court of Canada will be deciding on a number of issues of critical importance to women in the next two or three years, including not only the meaning of "equality" and more specifically "sex equality," but also whether legislation promoting rights of, for example, female victims of violence will be upheld in the face of challenges under other sections of the charter, whether the foetus has rights and, if so, how those balance against the rights that women have under the charter.

Our courts will be weighing rights such as freedom of expression or aboriginal rights against sex equality rights. These judges will do so in the context not only of precedents but also with an eye to the views of legislators on the priorities in terms of Canadian values, what they should be weighing against what.

The consequences of legislatures seeming to or actually elevating one set of rights in our Constitution over others, any other set of rights over equality rights, at this historic moment, when courts are interpreting the meaning, nature, scope and weight of these rights, is foolhardy and playing with the future of women in this country.

Whatever the outcome of the political debate about the accord, if it becomes law, it will be interpreted by the courts of Canada. Equality litigation has some features which must be understood and addressed in political consideration of the accord. Much effort has been expended by the minister responsible for federal-provincial relations, the honourable Senator Lowell Murray, senior officials of the Department of Justice and the joint committee to convince women that the accord does not override or supersede the charter.

The very same Department of Justice has argued the opposite in court recently. In a case taken by the Yukon territorial government, arguing that the rights of persons in the Yukon territory would be adversely affected by certain amendments in the accord, it was argued on behalf of the government of Canada that the charter could not be invoked to invalidate another part of the Constitution.

While we appreciate the assurance and most certainly keep the record in case we need it for future reference, our experience tells us that the governments of Canada, for whatever reason, are answering the wrong question. The right question is, "What direction will the Constitution, as amended by the accord, give to the courts in deciding equality rights cases where at least one of the parties relies on section 2 of the Constitution Act?" The only possible answer is, "No one knows." We may all speculate on the matter, but we cannot avoid the reality that no one knows.

This concern is increased by the following factors in addition to the ones already mentioned.

First, the generality of the concepts in section 2 promises that it will be invoked often in cases inside and outside of Quebec.



Second, the party initiating the charter action plays the primary role in framing the issues of the case and the remedies sought. The respondents or interveners then must operate within that framework. In short, government's view about how section 2 will be argued will not be determinative.

Third, courts must determine cases on the basis of evidence placed before them. Important decisions may be based on badly argued cases.

Fourth, even if an issue is under review politically, it can be forced into the courts, thereby pre-empting a political solution.

Fifth, saying, "Let the courts decide," a very tempting option, I do realize, is a denial of the considerable monetary and personal cost borne by the individuals and groups who must go to court either to advance their rights or protect their rights. In fact, section 15 of the charter came into effect in 1985. Women have more often been forced to act in defending their existing rights, as I mentioned a moment ago, as opposed to advancing their rights.

Now I will turn it over to Beth Atcheson.

Ms. Atcheson: I am sure you have heard many discussions of section 1 of the charter, which is, of course, the limitations clause, a very important clause in terms of charter analysis. In assessing whether a limit on a charter right is none the less acceptable under section 1, courts will examine a number of factors, including the nature of the right at issue. In determining the nature of the right, and thus the degree of weight it will bear in the analysis, the courts can look at the history of the right, whether it was protected at common law, and the total constellation of references to the right which may appear in the Constitution, including the charter. Thus, no one provision of the charter stands alone. It is always considered in its constitutional environment. Any alteration in that environment is bound to affect the way courts interpret the right and the balance they strike between it and other constitutionally protected values.

Because the Meech Lake accord will alter the constitutional environment in which equality rights have been interpreted and in which they would continue to be interpreted in the absence of the accord, LEAF's concern is that women's equality rights will inevitably be affected by it. This basic concern, arising from the very structure of the Constitution and the methodology of constitutional adjudication, is reinforced by the language of the accord itself. There is nothing in the accord to assure women that its recognition of some rights and interests will not diminish women's rights. In fact, the language of the accord goes in the opposite direction.

1620

To speak briefly about the Bill 30 case, which I suspect has also been discussed before you, the important holding in that case is that provincial legislation enacted under section 93 of the Constitution Act of 1867 for the purpose of enhancing the rights and privileges of minority denominational schools cannot be attacked under the charter.

According to Justice Wilson, who wrote for four members of the Supreme Court, this holding was compelled by a need to protect "a fundamental part of the Confederation compromise." According to Justice Estey, who wrote for the other two members of the court who took part in the judgement, the charter could not be interpreted "as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867."

There is no indication in either judgement that the immunity from the charter review is confined to legislative powers granted in the 1867 act itself as opposed to those added later to the 1867 act or granted in any later Constitution Act, including those admitting other provinces to the union.

If then the words of the Bill 30 judgement are not confined to the 1867 act proper, it becomes important to consider what a court would identify as a fundamental constitutional compromise. Critics of the Bill 30 judgement point out that this phrase could conceivably cover all sections granting legislative power to one level of government or another, because they all constitute part of the compromise that permitted Confederation.

We agree that such a wide reading would be absurd. However, we do think the Meech Lake accord would clearly be considered part of the fundamental compromise of Confederation, given the history of patriation from 1980 to 1987 and the significance of the accord in bringing Quebec fully into Confederation.

The Bill 30 case is disturbing for another reason. Section 32 of the Constitution Act provides that the charter applies to Parliament, provincial legislatures and governments with respect to all matters within their legislative authority. These words seem to apply the charter to the exercise of all legislative power distributed by the Constitution acts. The Bill 30 case seems, on the other hand, to create a sort of judicial exemption to section 32 in the case of some kinds of legislative powers.

The danger in creating any exemption is underlined by looking at the decision of the Supreme Court of Canada in ~~the Caldwell and Stewart~~ <sup>versus Stuart</sup> which is a 1984 decision. There, the protection for denominational schools in the Constitution was held to support the exclusion from provincial human rights law of the ~~the Vancouver school board's~~ <sup>the Vancouver school board's</sup> decision to fire a teacher because of her marriage in a civil ceremony to a divorced person. This case shows clearly that women can suffer when other group rights are furthered.

The point is also illustrated, and I know this point has been made to you in other testimony, in the case of the ~~Attorney General of Canada and Isaac and Bédard~~ <sup>versus</sup> which are the cases under ~~section 104~~ <sup>12(1)</sup> of the Indian Act.

It has been argued that the proposed new section 2 does not actually grant legislative power; it is merely a principle of interpretation. Of course, this ignores the possible interpretation of subsections 2 and 3, which relate to the responsibility to either protect, in the case of Canada, our linguistic duality or to protect and promote, in the case of Quebec, the distinct society.

We point out that there is no provision in the section 2 equivalent to section 31 of the charter. This provision states, "Nothing in this charter extends the legislative powers of any body or authority." Such a cap on the extension of legislative authority does not appear at all in section 2. Subsection 2(4) merely stipulates that nothing in this section derogates from the powers of Parliament, legislatures or governments. In fact, we have heard political comments to the effect that it is hoped section 2 will add to legislative authority.

Even if it is merely a principle of interpretation, we think that the impact of section 2 could be substantial. It will be used as an extra justification for legislation passed under other federal or provincial heads of power. It can provide yet another rationale for these laws and thus serve

to insulate them, or to help insulate them, wholly or partially, from charter review. All that is necessary is for a government to invoke section 2 and to argue that it is somehow related to language in any jurisdiction or to the elements of the distinct society in Quebec.

Moreover, because of the nature of our national legal system, decisions made about section 2 in one province will be considered by courts in other provinces when interpreting the provision.

Part of our argument, of course, is that it is difficult to predict how the Bill 30 case will be applied in future cases. We have already seen it argued just as we set out. We anticipate that it will be argued that way. Any of you who are involved in litigation know that legal arguments are structured from whatever materials are available at the time. Even if this interpretation or these possible interpretations are ultimately defeated, they will have to be fought through all the levels of court with very limited resources available to the groups that will be involved.

Now to the charter analysis and the accord, that is the question of balance within the charter. The nature of charter jurisprudence is complex. It does not consist of mechanical application of rules and principles. Similarly, the charter itself is complex. It is in the interrelationship between various of its sections, inevitably including section 1, that the answer to a particular question will be found. Thus, as a basic proposition, we say that to add new elements to the Constitution by the accord will inevitably affect and change what is there now.

We argue that the proper standard to be used is effect. It should be sufficient to show that equality rights are affected by Meech Lake because effect is the standard that already appears in the accord and, in particular, in section 16 of the accord. It would be invidious to require a showing that other rights would be more affected before they could be included in section 16 or otherwise preserved in the accord.

The main problem with section 16 is that it preserves from being affected only certain of the provisions of the charter dealing with some minority rights. By specifically mentioning provisions dealing with aboriginal and multicultural rights, the section by implication excludes rights dealing with equality, which are spelled out in sections 15 and 28. Importantly, these equality rights do not receive protection in common law like some of the other interests guaranteed as well in the charter. They are solely dependent on the charter for substantial protection.

This charter protection was achieved only a short while ago. Thus, women see the refusal to protect these rights from being affected by the accord as an unjustified step backward from a hard-won status quo. While other rights receive additional constitutional recognition, equality rights are being diminished in importance.

In effect, saying that aboriginal and multicultural provisions will not be affected by section 2 implies the courts are free to find that and allow equality rights to be affected. This ranking may likely weigh these preferred rights over sex equality rights in cases of conflict, may restrict the progressive use of analogies between adjudications on these issues and sex equality issues and may affect the comparative attitude of gravity towards sex equality cases across the board.

Many witnesses before the committee have pointed out that the proposed



new section 2 added to the 1867 act by the accord will figure in analysis under section 1 of the accord in determining whether a particular limit on a charter right is a reasonable one and justifiable in a free and democratic society. We suggest that the fundamental principles of section 2 might indeed be read into section 1, so that the charter section reads, "in a free and democratic society, where linguistic duality and the distinct society are accepted as fundamental principles."

If the concepts in section 2 are thus taken into section 1 of the charter, then it is reasonable to predict that the qualifier on these concepts which is found in section 16 will also be incorporated. The special reservation of rights for these groups arguably informs section 1 charter analysis under the charter to the detriment of all of those whose rights do not have such pride of place.

1630

To accept the accord in its current form is to condone the process by which it is developed and to launch Canadians on a constitutional pattern that threatens the integrity of equality rights in unpredictable ways. A round for one set of interests and then a round for another set of interests and so on will simply ensure that equality-seeking groups will spend their energies addressing shifting political agendas set by others. In reality, protection of equality rights is not divisible into rounds.

If our commitment to equality rights in this country is genuine, then let us reflect that in the accord by amending it to provide that nothing in the accord will abrogate or derogate from the equality rights provisions of the charter. With respect to this recommendation, we point out that we said to the joint committee, and we certainly say to this committee, that we are open to consider a number of other types of amendments. Some of them have been put before you. There are some, of course, that we do not accept and will not accept under any circumstances, but we are open to further discussion on this difficult question of the selection of the amendment that should be made.

Now we welcome your questions.

Mr. Chairman: Thank you very much. We probably have enough material to spend not only the rest of the afternoon but most of the evening in exploring some of these avenues. Even though we have been down the road on most of these issues, it always seems to me that every time we address them, there are certain perspectives or some new combinations of ideas that come together that make it still quite fresh in wrestling with.

I wonder if I could begin. I do not know whether you have had a chance to read the testimony that the chief commissioner of the Ontario Human Rights Commission, Raj Anand, gave to us, where he was discussing primarily the question of the charter. A number of witnesses raised this question. If we were putting forward an amendment, would we want to make that an amendment which is covering the charter globally or sections 15 and 28? Do you just try to withdraw section 16? I suggest that is probably a nonstarter in the sense that I think it is awfully hard to put something forward and then take it away. None the less, that is an option.

One of the interesting points in that discussion has been that the courts are defining what sections 15 and 28 in fact mean, and even five years from now there might still be questions depending on the nature of the cases. What is your judgement? It is eight o'clock in the morning, the first

ministers have walked out and they have not signed anything. They are going to go and have breakfast and they hand it to you and say, "Any suggestions?" Assuming you had free reign, what would you prefer to do and why? Anyone? All three? Just if you could wrestle through that option.

Ms. Atcheson: I think it is fair to say that for all the organizations that have studied the accord, grappling with the question of amendment is one of the most difficult things. For those organizations that operate in Quebec, as we do, the question that comes up to us is--normally, you do not draft in a vacuum. Normally, you do not pull very broad concepts out of the air and put them down on paper. We have said "equality rights," because that is the reason for our existence. We are now considering the question of the accord generally, and that will be put to our organization and subject to an open discussion within our own organization.

It is a very attractive one for precisely the reason you have given, and was proved very clearly to all of us by the Morgentaler decision, which is that we know the courts have before them this range of factors within the charter and they can select them, mould them, push and pull them, which is obviously the basis of our concern about the accord. So we are starting to see some things that no one would have predicted and that to some degree go against earlier case law.

We are open to considering the question of nothing in the accord derogating from the charter as a whole. We will consider that and we would be pleased to talk about it further. For the moment, though, our particular concerns are the equality rights provisions, one of the reasons for that being that most of the cases we take involve people with multiple disadvantages. It is not just gender discrimination; it is gender discrimination and race, religion, marital status or whatever. They are almost never single-issue. So we are open to considering it.

Mr. Chairman: I think this came up actually at the conference that the Commonwealth Parliamentary Association had in Ottawa, where I believe there was a professor from the University of Calgary who is putting all the cases on computer. It reminds me of those old Shakespearean word analyses that they do at Texas universities. They get millions of words and then they figure out what it means.

I will be careful here; I do not mean to misquote what he was saying. But it struck me that one of the things they were observing was that a number of the cases that have come forward, and you drew attention to this, are not in fact women's cases, but in many instances are men's where there is a particular issue, using the wording--I will just check this here because I would be interested in your comments--"Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

In a few years' time, we may find somehow the guarantee "equally to male...persons" has been used in a much larger percentage in effect to deal with issues that I think clearly it was not originally intended to do, if you go back to the testimony before the House of Commons at the time of the development of the charter. It seems to me the wording of that and so on was done in the hopes it was going to bring female rights up to where male rights were.

I suppose as part of the argument around whether it should be the whole charter or certain sections of it, one of the arguments that has been put

before us is that because we really do not know about all the elements of the charter and how they interrelate, if you were protecting the whole charter, while that would maintain the anomalies, at least as they got worked out, there would be similar relationships in terms of different rights.

But I see that what you are saying is, "Look, with sections 15 and 28, we at least have a sense of what we hope they will do and section 15 does include affirmative action. So there is both, if you like, a right and also a limitation on a right, but for a specific purpose. In that sense, had that been put into section 16 along with the others, at least the message of that would have been clear, whether or not courts dealt with it in some other way." That is really that point. I take it there is still the sense that by having left it out, one cannot prove, definitively beyond a shadow of a doubt, that will automatically mean certain things, but it adds another element of real insecurity and uncertainty.

Ms. Atcheson: In fact, while we take the decision to leave out the equality rights provisions as a decision made in good faith, we cannot help but consider that in fact they were left out for specific reasons which have not been disclosed to the Canadian public. In fact, the onus has been put on us to respond rather than for governments to set out the policies they are actually trying to achieve.

Mr. Chairman: I think one of the things we have wrestled with at times is trying to determine--you know, you start off saying, "Look, it was an oversight, a mistake, whatever." I have tried to think why Quebec would not want that in, or are there other provinces that did not want that in for certain reasons? At the time of the discussions back in 1981-82, when you had to work hard to get that included, were there arguments made then that, as you think back, appear to relate to this in terms of why it was not there, or are you just not sure why that happened?

1640

Ms. Atcheson: I think what we can do is go to the testimony around the Meech Lake accord. I do not think this issue came up in 1980-81. What we have to do is look at what is being said about the concept of linguistic duality--there is not much being said about it at all, in fact--and the concept of "distinct society," which is being very broadly interpreted. I think most references are to Claude Ryan's beige paper--I have the definition of "distinct society" here--which covers every major aspect of the governmental and quasi-governmental structure in Quebec. I am just leaving that thought there.

Of course, then we have section 32 of the charter which says that this applies to essentially any action taken by government. It is very dangerous to look at the concept of "distinct society" narrowly. In fact, it is not being put to us in that way.

Back from that, what that suggests is that around the more limited areas of perhaps culture or language or religion in Quebec, there are some specific concerns relating to equality rights. But that has not been put on the table; it is simply not clear. If there are specific areas where a government would wish to legislate that might come into conflict with broadly based equality rights, that should be made clear. If that is not the case, then there should not be an objection to extending the equality rights protections we have had.

Mr. Chairman: I apologize. The chair should not be doing this. I just want to follow up on this point.



Let us suppose that was being discussed. Here, I am interested in the collective right versus the individual right. In terms of Quebec, I am trying to think of a situation where, for some reason, for that government, which is the only one that has a francophone majority, there might be something whereby it is concerned that if a certain policy goes through, it is going to have an impact on the collectivity.

Would there be situations where you feel there could be a legitimate sort of conflict between a collective right and an individual right, where there would have to be, I guess, a perpetual tension between the collective right and the individual right, or do you think that no matter what that collective sense is, the individual right--I realize it is hard because we are not talking about specific cases and I cannot really give you one.

I have wondered if part of the problem Quebec might have had with some of the charter rights, if not the charter per se, might have been a feeling that there may be a time where there will be a need for certain action to protect the collectivity that may run into conflict with certain individual rights. How do we sort of measure that one? I just wonder if perhaps in discussion with some of the Quebec women as well, that may have come up and you may have tried to--

Ms. Jefferson: I certainly think the hesitancy on the part of a number of women and groups in Quebec to even entertain the notion of amendment is the need to say, "The paramount thing we want out of this is rights as Quebecers and the "distinct society." Anything that could be seen to compete with that or undermine it in any way--this is, of course, why getting even as far, as a national organization, as including sections 15 and 28 is some movement in that discussion.

There is a whole other sort of counter-possibility, and it is one that has certainly occurred to me, that in fact it was not planned, that in fact it was at the very last minute and was thrown in by one particular provincial government, that it was a last-minute thought and was not thought out and nobody is prepared to admit that.

Mr. Chairman: This is section 16?

Ms. Jefferson: Yes.

And that in fact no one thought it through. Certainly, the haste with which the accord was struck in the first place and the fact that this sort of surfaced, not in the first round but somewhat in the latter hours of the second round of discussions, suggests that perhaps--this is a question I do not know--political egos were involved or whatever. How do you admit to half the Canadian population that you have kind of accidentally left them out?

Mr. Chairman: A staggering thought to people with political egos.

Ms. Jefferson: It is a very interesting thought; I do not know.

The trouble is that it would seem, of those who were sitting around the table at the time, no one is prepared to concede the possibility that either intentionally or by accident women's rights are going to be affected, which leaves us in this rather difficult situation at this time.

Ms. Atcheson: Just a supplementary to that, to use your language: Our experience is that governments do many things and policies have many

effects, some of them anticipated, many of them unanticipated, and that until you actually get into the working of a particular law, you do not know what effect it is going to have, you do not know where the problems are going to be and where the successes are going to be.

What an organization like LEAF does all the time is essentially to work with laws that are neutral on their face, that were set up for policy reasons that do not necessarily have anything to do with equality, but in fact have a substantial effect on equality.

When it comes time to challenge those laws, governments rarely back off. They rarely agree that there is some sort of invidious or unacceptable effect. In many cases, they will defend those laws. They will do it on the same basis we have trouble with on the Meech Lake accord, which is that they are very nervous about the effect on future cases. They know that out of cases can come decisions, doctrines, precedents that are a bit like releasing bubbles into the environment. So they fight them.

Part of what we are saying is that even if there is no intent, and we have said that we feel that in good faith there was not, what will happen is that these possibilities for argument will be sitting there and they will be used. There is certainly no question in our minds, having spent two years watching how respondents structure their cases, that they will be used.

Mr. Offer: I know you had a supplementary in answer to the chairman. I am going to have a supplementary to the answer to the chairman. It has to do with the concerns you have raised surrounding section 16 and whether it was an oversight or whether it was not appreciated. There is also the argument that could be made that the ramifications of section 16 were well thought out, that section 16 was specifically put there, that there are reasons why section 16 is there and that there is a difference between section 28 and section 15 as being rights-giving, substantive sections as opposed to section 25 and section 27 as, if not fully interpretative, very much a collectivity of thoughts, which are in section 16.

There is also the side I did not think was brought forward, that those who were there and made the decision with respect to section 16 made that decision not due to lack of appreciation of its ramifications or with respect to oversight, but rather that they did, and that everyone there did, direct their minds to it and made the decision that section 2--because that is what we are talking about, the interplay between section 2 of the accord and section 15 of the charter, when all is said and done--is an interpretative section and does not convey rights by itself vis-à-vis section 15, which is a substantive rights sections. I guess my question to you is--because your response just did not mention that particular aspect of the question--

1650

Ms. Jefferson: I guess we are trying to give you the benefit of the doubt, that as government, you would not have been so foolhardy as to have consciously done such a thing.

Mr. Offer: That is exactly the question. Surely the concern that you have raised, that it was an oversight or was too quickly thought out, your comment really saying, "Certainly they have made that decision based on certain reasons." You may not agree with the reasons.

Ms. Jefferson: Right, and quite clearly we do not. In fact, it is an

erroneous distinction to consider section 28--the notion of interpretation, an interpretative section. What we have tried to do, if nothing else, in the presentation is to emphasize the complexity and the interrelationship of the different sections of the charter and that the accord and the decision to only include two rights out of all the charter rights to be used when interpreting section 15.

In other words, it is fodder for the kind of fire going in the wrong direction, in our minds. In fact, we feel it was an erroneous decision if it was a conscious decision. An understandable one, but on reflection, we hope this Legislature will see its way clear to saying, "On further reflection, we do see that it is far too complex to leave to the present wording of section 16 and it must be revised."

Ms. Atcheson: It is interesting, the question of whether or not there was a common interpretation and a common view of section 16, because in fact, last summer, we sent a telegram to all the first ministers and received a number of responses and a number of explanations as to the reason for section 16. The testimony to the joint committee bears the same thing out: a number of reasons, a number of responses, no clarity whatsoever. If the first ministers were going to stand and fight on the appropriateness of section 16 as drafted, one might have expected a better case to be put to the public. We certainly have not seen any opinions to support the interpretation that the first ministers might have had. When you look at this patchwork across the country of attempts to justify, explain and interpret section 16, there in fact is no pattern, which I think undermines the notion that there was, in fact, one agreed interpretation.

Mr. Offer: Which leads again, I think, to what came throughout the whole presentation, the whole question of uncertainty. Whereas you have got these section 15 cases before the court, you do not know how the court is going to go on them. You do not know how the courts are going to decide, based on a particular fact situation, which is, as you all know, variable, to say the least, and now we have put a second layer on top of those which will really take you right to the beginning again once you go through the section 15 cases. It leads to a question we have grappled with, probably since day one, and that is with respect to process.

You have been involved as this organization since 1982--

Ms. Jefferson: Since 1985.

Mr. Offer: --when section 15 came into effect.

Have you directed your mind to the whole question, not only of the constitutional reform process, which is what you have spoken to so far, if there are changes and if there are discussions surrounding the Constitution, how your input ought to be heard, the framework for such a process?

Ms. Atcheson: We obviously focus on an amendment because that is the critical thing at this juncture. Certainly the experience we have had with the accord will lead us to focus, as it will a number of organizations, on the whole executive federalism at the federal-provincial level of government that we now appear to be developing. I think, however, it is fair to say that governments already have established mechanisms for consultation. They do it all the time.

You will see in our litigation report that we list the occasions on



which we are approached by government to discuss very detailed proposals. There is no question but that the buildup to the Meech Lake accord occurred over a fairly lengthy period of time at a very secretive level, and you can understand part of that. In fact, governments reach out all the time. They could reach out in this situation. They reached out in 1981 when the charter was released in draft form and we were consulted.

It is not foreign to what governments do. It was foreign in this case, and one can only think that is for a particular set of reasons.

Ms. Jefferson: Indeed one of the things we want to emphasize today is that should the possibility of amendment be a real one, we would be more than happy to consult with this Legislature and indeed any legislature as to the wording and struggle--it is one thing to say you are going to amend it; it is a whole other thing to know what that amendment would look like. We are very committed to bringing our resources to bear on the issue. We do have quite a national network of constitutional lawyers, which could be quite helpful.

Mr. Offer: I wonder if I could have one short, sharp question.

Mr. Chairman: Certainly, a supplementary.

Mr. Offer: Yes. One thing which has been promoted by some groups is the whole question of a court reference. You have been involved in cases and you have cases pending and will have cases, I would imagine, in the future. The reason the groups promoted a court reference was to acquire a certainty. There are others who have said that certainty is in fact not going to be achieved through a court reference of sorts because of the whole question of the variable issues that will come before the courts in time. I am wondering if you could give us your thoughts on that.

Ms. Atcheson: The idea of the court reference has, in fact, been discussed by our national LEAF committee. It is something we are certainly prepared to consider. There are obviously two major points. The first is that the government that makes the reference controls the questions. If a reference is to be acceptable at all, there would have to be a meaningful consultation process around the questions. We are not going to find it any more acceptable to have the questions approached in the way that the accord has been approached, should that be any government's choice. That is number one.

Number two is, we probably more than any other organization, know the cost of litigating and know the cost of becoming involved in a case at the appellate level, as a reference would be, and then probably on to the Supreme Court of Canada. It may sound trite, but we have to ask why, if this is a political problem, we should have to bear that cost. It takes resources away from the kinds of cases that address the problems that women have and other equality seekers have in their day-to-day lives, and we have some problems with that. One answer to that is if you are going to go into a reference, then make some of the comparatively extensive resources of government available to the equality-seeking groups, a number of whom have already received recognition by the Supreme Court of Canada as being qualified and representative to be involved in that process in a meaningful way.

1700

Mr. Allen: Thank you. I apologize to you for not being present for your brief. I can only say that a constituent of mine was receiving an

outstanding achievement award and I had to be there. If this question has been answered in the course of your brief, please just simply say so and I will look up the record and check it for myself.

We have, of course, gone back and forth with respect to various ways that we might approach the accord and what we might do with it, how we might have some political clout if not immediate impact on the premiers in forcing them to renegotiate or whatever.

In the course of doing that we heard testimony on both sides with respect to section 16 as to the best remedy. There are some three options I understand. One is just simply get rid of 16 and let everything else stand. Secondly, add 28, which, of course, has the problem that you really capitulate in some sense at least to the hierarchy of rights because while you add one more to 16, you also in terms of section 15 of the Charter of Rights and Freedoms tend to reduce the handicapped and the aged and the other categories that are in there to being also-rans that did not quite get there.

We have heard the third alternative very persuasively presented to us by the chairman of the Ontario Human Rights Commission, Raj Anand--that in order to balance things up probably the best thing that could be done would be simply to take out 16 and put the charter in a language that you would recognize as appropriate.

Do you have in any sense some preference? I checked with our research person and he said that nationally as an organization you do not because you do not have that quite resolved. I wonder if you have any advice to us as to how you might tend to lean with regard to one or another of the options?

Ms. Jefferson: We certainly have a minimum which is actually a fourth option which you did not outline, which is 15 and 28 for exactly the reasons that you mentioned.

First of all, just in terms of our own specific interest of women's equality, most of the issues women face are very complex and involve multiple disadvantages; women who are handicapped, Indian women, immigrant women, visible minority women, that kind of thing.

Mr. Allen: You said 15 and 28?

Ms. Jefferson: Fifteen and 28 would be our minimum.

Mr. Allen: Was that not my second option?

Ms. Jefferson: You just mentioned 28. You said get rid of 16.

Mr. Allen: I meant to add that to 16.

Ms. Jefferson: Fine.

Mr. Allen: That is the third option.

Ms. Jefferson: Right. That is where we are at this point as an organization. However, the notion of including the entire charter has some attractions and it is one that we are committed to working through at our earliest opportunity.

I think it would be fair to say that we are open to any amendment that

would meet our basic criteria of at least 15 and 28 and are not adamant and rigid, saying, "It must be only this way." But certainly at this point our bottom line is 15 and 28.

Mr. Allen: OK. Thank you.

Mr. Chairman: Thank you very much for sharing your thoughts with us on a number of issues. The fact that we have gone over some of this ground before I think really helps to solidify certain perspectives and approaches. I think you have done that very specifically in terms of equality rights. We thank you very much and we also thank you for your offer of help.

Ms. Jefferson: Thank you.

Mr. Chairman: If I could then call upon our next witnesses. The representatives of the Toronto Area Caucus of Women and the Law, Nicole Tellier, Susan Vella and Melissa Rosen.

Could we arrange for some more water? What happens by the end of the afternoon is we dry up. Maybe Mr. Cordiano would be good enough to pass them that jug and that will at least help. Do you have some glasses there?

Ms. Tellier: Yes.

Mr. Chairman: OK. It is the water that you need. We have a copy of your submission. If you would like to speak to that we will follow up with questions as we did with the previous witness.

Ms. Tellier: Certainly. Just so you know who is speaking to you, I am Nicole Tellier, this is Melissa Rosen and that is Susan Vella.

Mr. Chairman: Fine. Welcome.

#### TORONTO AREA CAUCUS OF WOMEN AND THE LAW

Ms. Tellier: We are speaking on behalf of the Toronto Area Caucus of Women and the Law which is a member of the Caucus of the National Association of Women and the Law. Both the national and the local caucuses are comprised of feminists, lawyers, academics, students and people outside the legal profession.

Our goal is to improve the social and material conditions of women. We try to do that through both public legal education and law reform. We have lobbied on a number of issues, both in the federal and provincial arena, specifically child care, pornography, midwifery, family law and various aspects of criminal law.

I would like to start by saying that we are very pleased to have this opportunity to express our concerns with the accord and its proposed constitutional amendments, and to say that we hope we are coming to a committee with an open mind. When the national association appeared before the special joint committee of the House of Commons last summer, we had the sense that much of what we were saying fell on deaf ears, and that was due to very specific quoted comments in the press of the Prime Minister and others.

The lack of public consultation before the accord was signed and immediately following it led to some pretty widespread public criticism about process, which--as I was listening earlier--has been recognized by at least



one member of this committee. That mobilized the women in this province to secure provincial public hearings.

We are here today hopeful that this committee will give very careful consideration to our concerns. We have drafted specific amendments for pretty well every issue in the accord, so you have some draft legislation to work with. Just for the sake of clarity, we refer to "clause" in the accord and "section" in the charter, rather than using section for both documents, so we call it "clause 16."

We hope we will be able to persuade you that the accord must be amended, and that doing so does not necessarily have to alienate Quebec or jeopardize the accord at all.

Our brief sets out a fundamental principle and, as it is short, I will read it to you: With full awareness of the lack of accord in the Constitution existing since its repatriation, and recognizing that Quebec had to reintegrate into its position within Canada with dignity, the Toronto Area Caucus of Women and the Law is satisfied that provincial and federal governments achieved an agreement which respects Quebec's requests, especially with the attribution of a particular status. The Toronto Area Caucus of Women and the Law is hereby resolved to recognize and is recognizing that Quebec is, within Canada, a distinct society.

I would like to point out that as a local caucus of the national organization, our policies are consistent with that. At the national level, there was broad consultation with our Quebec members, which forms the basis of our position. Although we speak as Ontario women and as anglophone women, despite my name, we are sensitive to the position of Quebec and to Quebec women and francophones outside of that province.

Susan Vella will be elaborating our position on equality issues and Melissa Rosen will respond to any questions you have on federal spending powers, but before they do that, I would like to briefly set out our position on a number of other issues.

I will start by pointing out that, if you have time to read the brief or a précis of the brief prepared by your research officer or whomever, you will see that a major theme throughout the brief is participatory democracy. We are calling for greater representation of women, of other disadvantaged groups, of aboriginal peoples of this country, of the territories; and we are recommending a more open and public process around federal and provincial immigration agreements, the amending formula, and first ministers' conferences. We would like to see those groups I have just mentioned all be given a stronger political voice, and a voice that is constitutionally entrenched.

On that note, I will begin my comments on our recommendations on the Supreme Court of Canada.

The accord proposes an amendment which would give the provinces a voice in appointments to the Supreme Court of Canada. We see the rationale for that as being recognition of the Supreme Court of Canada as the final arbiter of division of powers issues.

Increasingly, the Supreme Court of Canada is being called upon to deal with charter issues, and a large number of those are equality issues which affect women and other equality-seeking groups. As the proposed amendment

stands now, it does not recognize this major role of the Supreme Court of Canada, and so we are recommending that, in addition to the provinces, the territories also have a voice in those appointments and that public interest groups be given a formal opportunity to make recommendations to the provincial and territorial governments which would then form the basis of the final list that is presented at the federal level.

1710

We not only would like a voice in the appointment process but would also like to ensure that the representation goes beyond our suggesting various people and other public interest groups to that body, and that there are actually more women and other groups represented in that body. To that end we have some very specific recommendations which you will find on pages 10 and 11 of the brief. We are recommending that this list I have spoken to be made public so that there is some accountability for the final appointments and what has been made of the recommended names on the list.

One of the things that the proposed amendments also do is entrench the convention that three members of the Supreme Court come from Quebec. We are suggesting that there be a constitutional commitment to redressing the gender disparity on the Supreme Court bench. You will find in the Constitution Act, 1982, a similar provision dealing with regional disparity. It does not address it, but it entrenches a commitment to redress it. We are suggesting an amendment that would have a similar effect and symbolize a constitutional commitment to increasing the number of women on the Supreme Court bench so that it reflects the population more at large.

We have very similar concerns and recommendations with respect to Senate appointments. Again, the territories have been ignored in the appointment process, and although the whole issue of Senate reform is slated on the agenda for the next first ministers' conference and these proposed amendments in the accord purport to be temporary, they have none the less modified the appointment process.

In doing so, again we would hope and we ask that you consider our recommendations--they only require inserting three words in the clause--to ensure that women's organizations also have a say in those appointments. To date, out of 104 senators, only 11 are women, and that is some 60 years after we won the case that recognized us as persons eligible to be appointed. I think that is very telling evidence of the fact that the current appointment process is seriously flawed.

We have some recommendations on spending powers. Very briefly, we would like to see the language made clearer and we have some suggestions on that. We think that "national objectives" needs to be defined, and we suggest that, at minimum, the definition include six basic elements, which are outlined on page 15 of the brief. These are similar to the criteria that appear now in the Canada Health Act. If there is any redefinition of national objectives, we hope that there would be broader consultation, because there are many groups which will be affected and which are beneficiaries of these cost-shared programs.

We would also like to see a minimum standard developed. One of our concerns with the current section 7 is that there may be very different standards of programs available, depending on your province. So as a major principle, we would like to see a minimum standard while recognizing that certain regions and provinces have particular needs.

With respect to immigration, we are concerned that any federal and provincial agreements that might be made as a result of the proposed amendments would not be subject, again, to the public consultation process. As it stands now, immigrant women already have unequal access to certain benefits, such as language classes. I believe the Women's Legal Education and Action Fund is involved in a case on that very issue and may have spoken to you about it; I missed the beginning of its presentation. We are concerned that there will be a further erosion of the very limited rights that female immigrants have if provinces and the federal government enter into agreements without public consultation and public scrutiny.

We have some concerns about the amending formula. There are two main issues. One, again, is the lack of recognition the territories have been given specifically on issues that directly affect them, such as the creation of new provinces or extending provinces into the territories. Similarly, the aboriginal people have not been given a formal voice, and we would suggest that they be invited to any first ministers' conference or any such forum where the issues set out in section 41 will be discussed.

We do not have a specific recommendation, and we hope your creative minds might be able to come up with one, but we would like to see some mechanism for resolving stalemates. I think we are going to get into very deep trouble if certain kinds of constitutional amendments require unanimity. If there can be some kind of fallback compromise to avoid stalemate, I think that is the recommendation we are making.

Finally, a note on the first ministers' conference. We propose that these conferences be made more open to the public and that information about, and meaningful opportunities for input into, the process be provided for. I think the Meech Lake accord stands as a very good example of lack of process around constitutional amendments, and we would hope that something similar to that would not be repeated.

We are concerned also, and it is worthy of note, that their first ministers' conference consists of 11 leaders, all of whom are men at this time, and yet their decisions have very wide--

Should I ignore that bell?

Mr. Chairman: You will be able to ignore it. It is a quorum call, so you can go ahead.

Interjection.

Mr. Chairman: We are going to have to adjourn and just go up for a quorum.

Mr. Offer: I understand the rules now are that once the quorum is reached, the bells will go off. They went off at 5:18, so since we are only a couple of minutes away we can continue and maybe the bells would stop.

Mr. Chairman: All is well. You can sense that there are some experienced old hands and there are some newer members here. We are glad, Mr. Offer, that you could get the bell to stop so that we can continue. It is a bit like coming back to school here with bells.

I apologize. Would you please go on?



Ms. Tellier: That is all right. I have given you a very brief summary of some of the issues which you may not have heard from other groups. Certainly on the Senate and the Supreme Court Canada, I would suspect we are one of the few that have made such explicit recommendations. I think at this point I will turn the table over to Susan Vella, who can speak to our concerns with respect to equality rights.

Ms. Vella: Good afternoon. We find it ironic that a document which purports to deal with perceived inequality of provinces may in fact infringe on the equality goals of other groups. We feel that this must not have been the intention of the first ministers.

Mr. Chairman: I am sorry, could you please speak a little more loudly? The interpreter is having trouble getting it all.

Ms. Vella: Certainly. You will have to forgive me. I have a cold, so my voice is not at its best.

As I was saying, we feel that this must not have been the intention of the first ministers, and in fact Prime Minister Mulroney was quoted as stating that section 2 of the Constitution Act could not be used to discriminate on the basis of sex. Certainly there seems to be an intention that sex equality rights were not to be infringed by the accord.

However, as you likely know from court decisions, the intention of drafters of legislation, including the Constitution and the charter, will not be determinative when an issue of interpretation of a section comes before the courts. For that reason, we would recommend that this committee take steps to remove any potential misconceptions or ambiguities by amending the constitutional accord before it is ratified by the Premier of Ontario (Mr. Peterson).

1720

We specifically have two recommendations. The first involves an amendment to the preamble. The fourth paragraph of the preamble in fact refers to the concept of equality, specifically equality amongst the provinces. We would suggest that you include three more words in that preamble so that it will read: "and whereas the amendment proposed in the schedule hereto...recognizes the principle of the equality of all provinces and their people." We would suggest that you include those latter three words. The reason for it is that should this document be challenged before a court, the court will look to the preamble as a statement of the policy which is intended to be reflected in the subsequent legislation. In fact, we have a Supreme Court of Canada decision which deals with our own Ontario Human Rights Code, called Ontario Human Rights Commission and O'Malley versus Simpson-Sears, which used the preamble of the Human Rights Code as fundamental to interpreting and applying the human rights provision to the case at bar.

The second recommendation that we make is to section 16. Specifically, we would like to see the inclusion of the applicability of sections 15 and 28 of the Charter of Rights to section 16 by adding a subsection 2 similar in wording to subsection 1, which refers to sections 25 and 27 of the charter pertaining to aboriginal groups and to multicultural groups.

We think this is a logical amendment in view of the fact that sex equality provisions of the charter hold a special place within the charter, much like aboriginal peoples and multicultural groups as reflected and

recognized in sections 25 and 27 of the charter. In fact, it is arguable that sex equality rights are the only other group which holds what we might call this special position in the charter, and therefore it would be logical to include this section in section 16 as subsection 2. You will find our recommendation specifically on page 6 of our brief.

We would like to suggest that the inclusion of section 28 alone would be insufficient, for the reason that section 28 pertains to an interpretation of the charter, and if the charter is excluded from the accord, as it would appear to be now, then section 28 obviously will not have any power or effect with respect to an interpretation of the accord. The reason we say the Charter of Rights has effectively been immune or isolated from the accord is from a principle of statutory interpretation which is called *expressio unius est exclusio alterius*, and you can bet that litigators will have fun with that one. Specifically, because there has been mentioned the application of sections 25 and 27 of the charter to the accord, there will be by implication an exclusion of all of the other charter provisions. This means that should a case come before the courts, the courts will be invited to interpret that any other charter right will be excluded from a consideration of the rights that are allegedly being infringed.

The second reason we say the charter does not apply but for sections 25 and 27 is the Bill 30 case, which I am sure has been spoken to today probably several times. Briefly, that case stated that as the legislation was taken pursuant to the Constitution Act and was part of the fundamental compromise of the federal system, the Charter of Rights and Freedoms had no application to Bill 30, and thus the individuals lost their rights to equality because of the wording of the Constitution Act that was in question.

Our concern as to why the exclusion of the charter's sex equality provisions is so important is that we can perceive examples where government action can be taken which will effectively infringe on existing rights which women now have in the name of promoting or preserving a distinct society.

We would like to point out that government action can be taken from any province in the name of promoting a distinct society under the current wording of the accord. One potential action would be, for example, a government program which currently promotes the rights of women--and it could be any program--being axed in favour of a program which is designed to promote bilingualism. As it stands pre-accord, that legislation could be attacked, by recourse to section 15 of the charter, by a women's group which is being specifically disadvantaged. Should the accord be passed without our suggested amendments, this recourse would be taken away.

I think it would be very sad if the rights of individuals were to be sacrificed, without thought, for the right of some broad government policy. We suggest simply that the inclusion of section 15, the sex equality provisions of it, and section 28 in the manner we have suggested would maintain the status quo, at least, and give the individual or a disadvantaged women's group the option of challenging such government action before the courts.

I refer to a case also on page 7, *Regina versus Morgentaler*, which I am sure everyone is familiar with. You will note Madam Justice Wilson's comments. She said:

"It is probably impossible for a man to respond, even imaginatively, to such a dilemma"--that is, abortion--"not just because it is outside the realm of his personal experience (although this is, of course, the case) but because

he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche, which are at the heart of the dilemma." And I want you to take note of the next section.

"The history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men... It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the sexes. Thus, women's needs and aspirations are only now being translated into protected rights."

I believe the rights she was referring to would be the rights enclosed in sections 15 and 28. I think we have it from the top court of the land that women's rights are ones which need to be given priority, and only now are they being given priority. I suggest to this committee that two amendments to the accord would reaffirm the court's statement and give back to women the rights that they have fought for in the charter.

That is the end of my presentation. Thank you.

1730

Mr. Chairman: Thank you very much. Clearly, I want to underline that you have put a lot of work into this. I guess, like people coming through a desert to an oasis, to see some specific recommendations is very helpful for the committee. I really want to underline that we appreciate the time and effort you have clearly put into a variety of parts of the accord, not only criticizing them, but then trying to come up with some amendments that perhaps could be put forward.

We will, most assuredly, individually read through these carefully, no matter what our esteemed research director, Mr. Bedford, does. I think this does put a lot of things in perspective and then provides the amendment.

If we could then move to questions. Mr. Offer?

Mr. Offer: Thank you, Mr. Chairman. Thank you very much for your presentation. I would basically like to get into the whole question of the cost-sharing aspect. The reason I do that is because you state, on page 16, "...some problems facing women are national in scope and that not every province has the resources to provide for comprehensive social programs...."

My question is, keeping in mind what section 106 of the accord has to say, that these are areas of exclusive provincial jurisdiction, do you not feel that this, in many ways, would provide a mechanism for provinces to either adopt the national program or, if not, to opt out and adopt a program which very compassionately and sensitively meets the needs within their province?

I guess I am taking issue with the paragraph, because it somewhat assumes that everything is sort of equal across the province and the conditions are sort of the same across the province, and we have heard, throughout our testimony, that they are not even sort of the same within this province.



In my opinion, this particular section has always been a vehicle which provinces can use if they want, with compensation, to address, maybe in a better way, the particular needs which you have outlined. I just wonder if I could get your comment on that.

Ms. Rosen: While recognizing that provinces should be free--and they have been, to an extent--to respond to regional or provincial concerns, we are very concerned with the way the accord is worded now.

First, there are no guidelines or minimum criteria which each province should adhere to. Along that line, we have concerns with three specific phrases, which are set out at page 15 and 16. Just to outline those, there are problems in that the phrases are vague, but there are also problems in that the phrases are different within different clauses of the accord. If you apply the principle of statutory interpretation which Ms. Vella referred to earlier, namely--well, I will not requote the Latin. Basically, if you say it one way somewhere and say it differently somewhere else, it will be assumed that you intended something differently.

For example, referring to the phrase, "national shared-cost program," we do not know exactly what it means, because it has been referred to different types of programs with different standards. But we also do not know how different provinces will apply that. To give an example, if a province wanted to apply federal child care funds to a provincial program, the only criteria in clause 7 which they have to meet are that it be a national shared-cost program, that it meet national objectives and that it be compatible. In terms of compatibility, they may say that child care is compatible with a kindergarten program and use federal funds to fund a provincial kindergarten program and, for example, divert provincial kindergarten funds to some other use. There we have a province implementing a program that is not really new or needing the specific new child care concerns in that province.

Mr. Offer: I understand what you are saying. In fact, that particular example has been brought up before and it is an extremely important example because it gives us something to really think about when we are talking about this section. I guess my thought is that it allows you, through this section, where it did not allow you before, to say to a particular province singly, "Listen. This is the national program. These are what the objectives are." You are in fact lobbying, saying, "We want you to comply with that, to opt into that particular program. We understand that it is under exclusive provincial jurisdiction."

In the alternative--and I think this is what I always find is the real strength of this one section--groups across this province and groups across every province can go to their province and say, "That is the national program, but it does not meet the specific situation and conditions of this province. Now, under the Constitution we want you to opt out and we want you to opt out for this reason, so you can better meet the needs in a provincial area or sphere, maybe what the federal government was hoping to do in the national area."

This is one problem. I have always had a problem as to why groups, instead of condemning this section, would not actually embrace the section and say, "This is really going to ensure through the Constitution that we are going to be able to take our concerns in a very meaningful way to the province, even if the federal government has entered into a national cost-shared program."

Ms. Rosen: To implement any kind of--to use your phrase--meaningful program that can actually benefit the people in a province, we agree that the federal-provincial cost-sharing program idea is fantastic and it is great, but it will be entrenched in the Constitution. Our specific concerns are that, first of all, there are no minimum criteria. As a suggestion or recommendation, you could, for example, adopt the six criteria that are set out in the Canada Health Act and those are listed on page 15 of our brief.

First, there are no minimum criteria. Even if there were minimum criteria, there is really no mechanism for monitoring compliance or, after it is found that a province's program did not comply with these national objectives that, hopefully, are now defined at a very minimal level, method of redress.

Ms. Tellier: Can I just add a comment? I am curious a bit about your question because I am not sure that I hear you saying you have concerns with these elements that we have, in fact, listed. I would suggest to you that none of those six elements would necessarily constrain a province or territory from providing programs that meet the regional needs. All we are saying is that there has to be a minimum standard to get the money. I think those are two very different issues.

Yes, you definitely need to have enough freedom with your spending power in order to discharge your jurisdictional power to provide programs in a certain area, but we are also saying that Canadians in Prince Edward Island should not be any better or worse off than Canadians in British Columbia in the context of their specific needs. Then I would submit that defining national objectives in this way does not constrain a province from meeting its particular needs. It just ensures that there are minimum standards.

1740

Mr. Chairman: Thank you. I regret that clock says 4:45. I wish it were but it is close to 5:45 and we have another witness to hear from this afternoon, so I am afraid I am going to have to close off our exchange at this point. I do reiterate that we are very grateful for the brief number of points you have touched on and the recommendations. I can assure you we will look at those very carefully and very closely. We thank you for coming this afternoon.

I call the representatives from the Young Women's Christian Association of Metropolitan Toronto: Luanne Karn, the social action co-ordinator, and I know there are a number of others. Perhaps I could ask Miss Karn to introduce all the members of the group.

#### YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN TORONTO

Miss Karn: My name is Luanne Karn. I am a social action co-ordinator at the YWCA. I would like to introduce Micheline McKay-Comparey, one of the members of our social action committee, who will be presenting today's brief, and Ellen Campbell, who is the executive director of the YWCA of Metropolitan Toronto.

Mr. Chairman: Welcome. We appreciate your coming. I am sorry we are a bit behind but we will certainly go through the presentation and ask questions afterwards. Please go ahead.

Ms. McKay-Comparey: Thank you very much. The YWCA of Metropolitan Toronto, established in 1873, has a long history of providing service to women

and girls and advocating social change, particularly change that relates to the equality of women. Our services range from short-term crisis and long-term housing services for women to educational services, community services and recreation. In 1987, we served 18,000 people, most of them women.

Integral to our mandate is our work for social change in areas which affect women's lives. The YWCA has made numerous presentations to many communities and commissions on subjects of interest to women, such as pay equity, equality rights for women and the Social Assistance Review which was recently held in Ontario.

The YWCA's policy statement on the status of women provides the fundamental basis on which most of our policies and positions are premised. It states:

"The YWCA of Metropolitan Toronto: (1) reaffirms its support of women's right to equal status; (2) supports the individual woman's rights to self-determination in all spheres of her life; (3) continues to assist women individually and collectively in their efforts to develop skills and strengths in order to facilitate their attaining equal status; (4) acknowledges the need for institutional change and urges all institutions to offer women parity with men in all spheres of civil, social and political life; (5) supports women's rights to freedom from psychological and physical abuse resulting from unequal status; (6) continues to co-operate with other groups and organizations that are working towards the same goals."

This policy statement was adopted in 1980, and I believe it still stands now as strongly as it did then. A copy of the complete statement is also appended to our brief. It is on this solid foundation that the YWCA of Metropolitan Toronto welcomes the opportunity to make this presentation to the Ontario select committee on constitutional reform.

Like other groups who have preceded us, including those today, we applaud the efforts of Prime Minister Mulroney, Premier Peterson and the other provincial premiers to bring about Quebec's full participation in the Canadian Constitution. We feel that Canada will be a stronger country with the full participation of all provinces, especially Quebec. We do, however, have specific concerns about the provisions of the Meech Lake accord.

Today, we will specifically address the issues of women's equality rights, section 16 and national cost-shared programs. We want to reiterate that Quebec's participation cannot be brought about at the expense of these concerns to women.

Perhaps I will please you or displease you--I am not sure--but we have left the more rigorous legal analysis to groups such as the Women's Legal Education and Action Fund and the National Association of Women and the Law, who are much more qualified to address the constitutional provisions than we are. We are however, very concerned about the two concepts of women's equality and national cost-shared programs, two areas that affect us as a service deliverer to women in this community. As you know, the Y is a national organization. We are, however, speaking for the Metropolitan Toronto Y. Having said this, we do support the statements made by such women's groups as LEAF, the Ad Hoc Committee on Women in the Constitution, and other groups like that.

With regard to women's equality rights, section 16 of the accord specifically protects sections 25 and 27 of the Charter of Rights and Freedoms, those clauses guaranteeing aboriginal and multicultural rights. Put



another way, this section exempts multicultural and aboriginal rights from being affected by the accord's guarantee of linguistic duality and distinct society. By inference, this clause opens the possibility that those rights not specified, including women's equality rights as provided in section 28, may not be protected. In our view, this creates a hierarchy of rights.

Future decisions of Canadian courts cannot be foreseen at this time. Consequently, women's rights and our quest for equality may be jeopardized by the accord as it is presently written.

The YWCA sees sections 15 and 28 of the Canadian Charter of Rights and Freedoms as providing the critical impetus for women to achieve equal status with men in all aspects of society. If this accord is entrenched in the Canadian Constitution as it is proposed, it is possible that future governments may use the accord's provisions to override the charter's guarantees of equality for women. For instance, language-oriented affirmative action programs may override affirmative action programs for women.

There is no question that women and other minorities do not enjoy equal status in society. As recently as October 1984, the Commission of Inquiry on Equality in Employment stated that what is happening in Canada to women, native people, disabled persons and visible minorities is not fair. Many people in these groups have restricted employment opportunities, limited access to decision-making processes that critically affect them, little public visibility as contributing Canadians and a generally circumscribed range of options.

Since 1874, the YWCA of Metropolitan Toronto has provided services to women and advocated for changes in legislation, regulations and employment policies, all of which would enable women to participate more fully in the economy on an equal basis with men. The accord, as it is presently written, may jeopardize the achievement of women's equality in society. Consequently, the YWCA of Metropolitan Toronto recommends that either section 16 of the accord be amended to include section 28 of the Canadian Charter of Rights and Freedoms--a minimum position--or section 16 be deleted and provisions stating that all charter rights prevail over the accord should be added.

The second concern is national shared-cost programs. Section 7 of the accord allows provinces to opt out of national shared-cost programs if the province carries on a program or initiative that is compatible with national objectives. This provision raises two areas of concerns for the YWCA, first, the limiting of federal spending powers and, second, the potential diversion of funds intended for social, educational and health care programs. Women and their children are major users of these programs. Any erosion of these programs will have strong adverse effects for women.

We have concerns that the renewal of the existing fiscal arrangements legislation, which includes the provisions for Canada's health care system and post-secondary education and other shared-cost programs, such as the Canada assistance plan, may result in inequitable access and quality of services for women from province to province. We are also concerned that no new national shared-cost programs may ever again be established.

The YWCA believes in universal, accessible, portable and comprehensive national social programs. Without definitions of "national objectives" and "compatible" and without national standards, the opting-out clause endangers equal access to social programs for all Canadians. The standards for existing programs may be in jeopardy and future national programs may never again be

possible. Consequently, the YWCA recommends that section 7 of the accord should be deleted.

These two focuses are major concerns that we have with the accord. There are many others that other groups have. Obviously, those are things that we have talked about. However, we think these are the two critical elements of the accord that affect women and affect our ability to work towards achieving equality for women in Toronto and across the country. Thank you very much.

1750

Mr. Chairman: Thank you very much. I think your concerns are set out very clearly and specifically, and certainly the YWCA's long involvement with women and women's programs is well known and we appreciate the fact that you have come before us today.

Could I just ask one thing? Has the national body set out a position on Meech Lake, or have you had national discussions, and is it basically similar to what you have done?

Ms. Campbell: I do not think the national body has prepared a specific response to Meech Lake, but it has the same general status of women basis as Toronto does and the same commitment to women's equal participation in society.

Miss Karn: I could add that, as well, they are very committed to the process of consultation among different YWCAs in terms of finding a solution and amending the accord. They are quite open to listening to what other provinces have to say about the issue.

Mr. Allen: I must say I certainly subscribe to your central premise, which is that nothing with respect to women's rights should be taken for granted. There is very little in history that would justify anybody resting on his or her oars on that particular proposition.

Just as a clarification with regard to your statement on page 2, "For instance, language-oriented affirmative action programs may override affirmative action programs for women," I am not quite sure just what specifically you have in mind. The previous group did refer to the possibility of a program that was in place, let us say in Quebec, being cancelled to free up funds in order to provide a language-based program of some kind, and I can understand that with respect to an existing program.

Are you also suggesting that the government's hands ought to be-- The implication is that in future, if a government were to propose a language-oriented affirmative action program and women's organizations had any program whatsoever outstanding at the time that they wanted, they would consider it inadmissible for the government in question to embark on the language-oriented affirmative action program. Do you see the point I am making?

I am not sure whether you are concerned about some retroactive problem or whether you are really trying to absolutely tie a government's hands. I think some of the possibilities in the language of some amendment to that effect might really have a very heavy impact upon a government's general sense of deciding what, at any moment in time, is a preferable course of action, given what has been done in the past, etc. Can you respond to that a bit?

Ms. McKay-Comperey: I guess the concern is one based on

retroactivity. It is awfully hard to foretell the future. We would not want to be in a position where our programs would be second to one of a linguistic nature.

It is difficult to say that with a constitutional sense, because so much of what drives us is spending powers, be it spending powers of provincial governments or our federal government. That is an entirely different set of priorities that must be addressed, and that is fair. It is government's job to address what money gets spent on.

We do not want to be in a position of finding that constitutional reasons give government the reason or the precedent to establish a linguistic affirmative action program over a women's affirmative action program.

Luanne, do you have anything to add?

Miss Karn: We are worried about a hierarchy of rights being established, not that a right to establish a language-oriented affirmative action program be taken away from Quebec but that a hierarchy of rights is established and women's affirmative action programs can be seen as given lower priority on the basis of this document.

Mr. Allen: Any language-oriented affirmative program, of course, would normally, applied to any group, equally benefit men and women, so that is not in question, presumably.

Miss Karn: No, just that one would have priority or there would be a hierarchy of rights for the--

Mr. Allen: With respect to the spending powers and the shared cost programs--of course, you realize this point has been made to us many times and we are trying to get our heads around it--I do not know whether it helps you in your reflection about it to know that the Canadian Council on Social Development, which came before us in Ottawa and is a body which is concerned and expects that there should be many new national shared-cost programs in a whole broad range of subject areas, did think it was possible to interpret "national objectives" in an appropriate way that would be quite inclusive, and probably every bit as inclusive as the language "national standards." If you were satisfied that that was indeed the case, would you still have a problem?

Ms. McKay-Comperey: The status now is that we are not satisfied with the wording "national objectives." That is something that obviously appears to have been left up to the courts. We would have to be very happy with the definition of "national objectives" to consider that option. I might add that when "national objectives" is being defined outside of the constitutional arena of the Meech Lake accord, it obviously becomes much more open to future change and things like that.

One of the great strengths of national shared-cost programs and the federal spending power has been that it has been a very open spending power, which has been able to achieve wonderful national objectives for this country. By tying it down to a definition of "national objectives," we are tying it down and perhaps limiting it.

I think such things as the Canadian health system, the Canada assistance plan, post-secondary education and the host of other national cost-shared programs have been developed in large part because of the openness of the federal spending power. Limiting that in any way, shape or form has potential for limiting national programs.



I might add to that point that by saying we must maintain the mechanism for national shared-cost programs does not mean we are in any way limiting the right of a province to add on to that, to make it more specific to provincial needs and goals or to supplement it in some way. It is simply that we must have a minimum set of national standards, be it in health care, child care or any social or other program.

Mr. Allen: You realize that in order to do that you are going to have to set up a whole range of definitions that would pertain to social programs, economic development programs, etc., wherever a shared-cost program could come into existence across the whole range of powers of the federal-provincial administrations. That would be a remarkable intrusion into the Constitution of something to which there is nothing comparable at the present.

Is it not true that although what you say is the case, that because there is no definition around spending power or shared-cost programs in the Constitution, there has been remarkable openness, none the less what has happened in the process of negotiation is that normally Quebec has opted out in some form or other and designed its own program, and that has really had the essential effect of what we now have in Meech Lake, and nothing particularly disastrous has happened to the nation in terms of unequal access to unequal programs in the course of that. There are good precedents now in those programs which would suggest how "national objectives" would be defined, surely.

Miss Karn: We are concerned about the erosion of any established national programs and any new programs which are set up. We feel that is very important for women in terms of accessibility and quality of service across Canada. Certainly, you can pull out examples of provinces that have created good quality programs on their own, but you can also imagine other situations where social programs for women may not be equal. There may not be the same quality, the same level of accessibility. I think reproductive rights is a good example and one we are concerned about.

Ms. McKay-Comperey: To add to that, a case in point is the Canada Health Act and the Canadian health care system. I do not think anybody would say that health care across this country is equal on a province-by-province basis, but the Canada Health Act has established certain minimum criteria that must be met. There are the five of them: accessibility, portability, universality, public administration--the fifth one escapes my mind. But that has achieved the objective of a minimum high standard of health care across this country. I think there is something to be said for that.

Mr. Allen: Yes. That just takes us back in a circle, because I think the statement that I referred to by the Canadian Council on Social Development really suggests that those criteria are quite developable under the language of "national objectives" and "compatibility" and so on. But I gather that your principal concern about accessibility and equal applicability for women in particular would be met by your proposal that the whole of the accord be subject to the charter. The principle would be there.

Miss Karn: Certainly, the minimum we recommend is the inclusion of section 28; that is another possibility that has been recommended. We have recommended the inclusion of the whole charter. I think that what other groups have reiterated in terms of a process of these amendments is important, because there are so many different factors to weigh that there needs to be a consultative process in terms of figuring out what amendments would be appropriate for ratifying the accord.

Mrs. Fawcett: Again on the shared-cost programs, it was suggested to us by Mr. Pickersgill that a new shared-cost program under Meech Lake would not get started unless nearly all the provincial governments agreed to participate. If one or two opted out, the conditions for compensation would have to be approved by Parliament. There would not be any automatic or unconditional payment. Parliament would have the final word on all the terms of any shared-cost program and any compensation. Just what would be your feeling on that, if that is the interpretation of it? There are those who think that is one of the big gains of Meech Lake.

Ms. McKay-Comparey: Perhaps I could respond with a question and then answer. What if a province chooses not to opt into the program or to develop a program with compatible national objectives? They do not get the money, but that service is not offered in that province.

Mrs. Fawcett: Yes.

Ms. McKay-Comparey: In that situation, you do not have universally accessible programs, whatever they be. They would not be health care. It would be child care or something like that. I think there are programs that may not be under specifically federal jurisdiction, but which certainly have a national perspective to them, and that might eliminate that.

Mr. Chairman: I regret that the time has come to five after six. As so often happens in our days as we look at Meech Lake, we have many questions. There are many issues. Today it happens that we had a number of groups looking particularly at this issue of the charter rights. I think a number of your concerns have been reflected in the weeks before but also in terms of specific points that have come up today. We appreciate your expressing those and sort of singling out the two key areas, which indeed have been singled out by many.

We apologize that we were late in getting to you, but thank you very much for both your presentation and the answers to our questions.

We will reconvene here a week today at 9:30 a.m.

The committee adjourned at 6:05 p.m.





CA200  
762  
-87052

C-24a  
(Printed as C-24)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 13, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Faubert, Frank (Scarborough-Ellesmere L) for Mr. Elliot

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Ontario Committee on the Status of Women:

Hutchinson, Susan, Member, Steering Committee

Grills, Lee, Member, Steering Committee

From the Canadian Coalition on the Constitution:

Hall, Dr. Tony, Secretary, Sudbury Steering Committee; Professor, Department  
of Native Studies, Laurentian University of Sudbury

Individual Presentation:

McDonald, Michael J.

From the Canadian Advisory Council on the Status of Women:

Pepino, N. Jane, Ontario Representative; Lawyer, with Aird and Berlis

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 13, 1988

The committee met at 9:36 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: If we can begin our session, I would like to call upon the representatives of the Ontario Committee on the Status of Women, Lee Grills and Susan Hutchinson. Please be good enough to come forward and take a seat. We have a copy of your brief, which is brief. I am sure you will elaborate as you go on, but perhaps I could turn the microphone over to you. We will follow up with questions.

ONTARIO COMMITTEE ON THE STATUS OF WOMEN

Ms. Hutchinson: My name is Susan Hutchinson and my colleague here is Lee Grills. We are here to represent the Ontario Committee on the Status of Women. The OCSW is a nonpartisan, nonprofit group formed in 1971. We have about 500 members and have worked on a variety of issues since that time of particular concern to women.

Before we explain our rather brief brief, we would like to express our public thanks to your committee and staff. They have been courteous, kind and zealous in their desire to find a mutually convenient time in which we might meet with you. We appreciate that.

We will not be doing a clause-by-clause criticism of the Meech Lake accord as so many others have already done so. We urge that you reread the transcript of the presentation by the Women of Halton Action Movement on March 30. We agree completely with them in terms of their discussion on process and analysis of the accord.

Now, our brief.

You will see in front of you an H for haphazard, which characterizes the process which we believe has been used to arrive at the document under discussion.

The E is for erasure, the erasure of equality, which we feel is the result of the document.

The L is for a lapse in memory for the architects of the Meech Lake accord, who forgot the charter. They forgot women and minority groups again.

The P is for the passion which we feel about the issue and with which we hope you will persuade our government to pursue amendments which we must have so that all of our work will not disappear.

I will turn it over to my colleague.



Ms. Grills: I am going to tell you a small story just to try to help you understand exactly how we feel. We have had a lot of discussion in our group. I think the bottom line for all us is abject terror at what is happening.

My story is quite personal. When my grandmother was born, women were chattels. They went from the homes of their fathers to the homes of their husbands. When my mom was born, not a whole lot had changed except that there were a few women working out in the labour force for wages which gave them a degree of independence. By the time I was born, women in Canada could vote. We could hold public office and we had already been declared to be persons, which was quite a landmark decision in this country.

When my daughter was born, women were entitled to equal pay and married women could be employed by the civil service. That was a great battle of the past. About 18 months ago, a really wonderful thing happened; my granddaughter was born.

Kathleen ??Michelle is named for the so-called two solitudes of our country. I will tell you what was a very moving experience and I think it was because of what my daughter said to me. My granddaughter was not even 10 minutes old. She was not washed yet. She was so new to this world. Karen, my daughter, had obviously been busy rehearsing something.

We did not know the gender of this child, but she thought, I think, a lot about what she was going to say when she presented me with this new life. She said: "Mom, this is the first female in our family who is an equal partner in our country. Just imagine what a life she will have. It is wonderful that so many people worked so hard to make this happen."

I thought that was a very heartfelt comment on her part. She has followed developments over the course of her rather short life and she knew I had been involved in issues of this sort, that my mother had and that my grandmother had, and she was trying to thank us for the past.

Before I came back to Toronto, Karen and I sat around for two weeks bouncing this little baby, which was really quite special. We spent a lot of time talking about what kind of life Kathleen ??Michelle could potentially face. She would be free from discrimination and from a lot of the roadblocks that had been placed in the way of other women, just roadblocks to their potential achievements. We concluded that expectation is quite often half the battle that we have to win in our lives.

I do not know what it is that we can tell all of you that will convince you to really convince our government to amend the Meech Lake agreement. It must be done or we will see all the work that has gone on just disappear. This was such a rich promise for us, and we have not even had a chance to get into court yet to really use the charter. Now we are going to have to go to court to work on Meech to find out what it really means.

We have heard a lot of discussion and rhetoric about it is not going to affect anything. We simply do not believe that. Our experience in the past tells us that if we do not do what we must do prior to the legislation being passed, then we will spend years in court fixing things. We think it is a waste of taxpayers' money to tie up the court system when we know the intention was not to leave us out. We think instead of telling us, "We did not leave you out," it should say so.

I was wondering if any of you has really sat down and thought about the millions of people in this country who have now been counted out. It is not solely the women, and we are more than half the population. It is also physical minorities, the people in the far north and people with disabilities. That is far in excess of half of the population. So who does that leave? I think it leaves the same old gang in charge, and we are not the least bit content with that.

Someone during these hearings, and I wish I could remember who, said that no Premier in his right mind would stand up and publicly say that women were not entitled to equality. I firmly believe, and many other people have said this to me, that this is precisely what they did. They forgot us again, and we are not the least bit happy with that.

Equality is definitely threatened. If Meech does not say what it means to say, then please talk this government into amending the accord.

Are there any questions?

Mr. Chairman: When I said hello coming in, you said your presentation was going to be somewhat different, and it has been, but no less effective. So often we forget with constitutions and constitution-making that it really does touch us. I think your story about your granddaughter is real and very meaningful. Perhaps you wondered how that story might impact on others. This has come up at different times but particularly during these hearings which have been going on for a while now.

I have a daughter who is 18, finishing grade 13 and about to head off to university and so on. We talk about this. I sort of say to myself, here is somebody who is bright, full of vigour, looking forward to who knows what. Then I say, is there going to be something that will stand in her way of achieving her goals and objectives, whatever it is that she wants to do? That may be something that, particularly for fathers, is an interesting way to look at it. You look at your sons and you do not necessarily ask that question because you just assume they will battle through somehow. If they have problems, it is not necessarily because of their gender.

I think the personal route there is, none the less, effective, especially at this point in our hearings when we have, understandably, heard some fairly detailed clausal analysis. Also, I think for the television audience it was a unique presentation in the way you described the different meanings of the words. We will certainly remember the presentation.

Ms. Grills: We scanned the thesaurus, and let me tell you, we came up with many others. Aside from "haphazard," there was "half-baked" and many others.

Mr. Chairman: Yes, I am sure there were some that probably could not be on a family show like this.

Mr. Allen: Mr. Chairman, like yourself, I want to say a word of appreciation for the very personal story that was recounted. It does take me back to the early years of my own children and our placing of them in among the first French programs that were available for non-French-speaking people in Canada. I guess it was three or four years after they had been involved that I began hearing the story of the tidal wave of more and more anglophones who were putting their children in such programs, but I was disturbed about



one thing. The reason that began to come forward was: "Our kids will not get jobs. We want them to have work when they grow up and, obviously, this will help them get jobs." It was the last thing that was in our minds.

We felt very deeply, as your daughter did, that there was something very important about seeing that our children were able to function in all parts of our country with, in particular, a capacity for French and English, and then since my wife is Ukrainian, to be able to relate to some other cultural groups that were around in the neighbourhood. That was the motivation.

One of the things that has really impressed me about the hearings we have had is that so many people like you who have come forward to raise questions about the Meech Lake agreement do not do so with any doubts or equivocations about the importance of our being French and English in Canada and being comfortable about that. That is what I appreciate so strongly about your brief.

Like other members of the committee, I have listened very carefully. I have been very involved in the course of my own lifetime in helping promote the cause of women and equality, as has our party. I find there is a great difficulty that I have and, I think, presenters have with the Meech Lake accord and the exercise we are in. There is a kind of constitutional code that you have to break in order to get some sense as to whether things are going all wrong or all right or somewhere in between and how you read all that. That is why I sometimes wonder why we are so unwilling to give any credence to assurances that since this is the Quebec round and we want to concentrate on that and there may be some problems along the way, those are fixable. Can you respond to that question?

I think that is what some people would say: "We are well-intentioned. There were perhaps some oversights but also some reasons why section 16 got in the way it was. They were interpretative clauses, they were not substantive clauses, and so the substantive clauses remain, the charter remains and always will be read over against Meech Lake. The balancing is there and so on, but that is fixable." They say that but you do not believe that. You just simply said you do not believe it. I wonder if you could tell us a little bit more why not.

0950

Ms. Hutchinson: I have a deep mistrust of any kind of amendment that is made and agreement that is come to at three o'clock in the morning after a long evening of negotiation, a lot of cups of coffee and probably some frayed tempers. It leads to things being left out, misunderstood and not quite figured upon, the drafting language being not quite perfect and that sort of thing.

That happened the last time out, and we had to change it. We headed off to Parliament Hill. Thousands of us across the country dropped out jobs, dropped our family obligations and ran off to fix a mistake that was made in the kitchen at two in the morning. It is not the first mistake from a kitchen that women have had to fix.

This time out, some groups were included in a so-called interpretative clause. One wonders why those particular groups required an interpretative clause and others did not. If there was no real need for an interpretative clause for women and other groups, why bother with an interpretative clause at all?



The process, we feel, has not been one that includes large numbers of Canadians. Obviously, large numbers of Canadians are interested. We are in the midst of building our country through that Constitution, and it is being done, as we said, in a haphazard and sometimes half-baked way. It is unfortunate that we cannot expand the process. This committee is one way of doing it, but do we have to go back and fix things all the time? We do not want to have to do that by fighting through the Supreme Court.

Ms. Grills: In addressing fixing, I would also like to say, why should we have to go back and fix it? Why do we not simply take a moment and fix it prior to everyone signing? If, as we have been told, we were not meant to be left out, then put us in. I really do not understand and do not believe that those 11 people--now only nine--cannot agree. If they all agree publicly that they are in favour of women's rights, then I see no problem with fixing it.

Mr. Allen: If you had one shot at fixing the accord, what would it be? Would you simply eliminate section 16 to put everybody back to square one? Would you eliminate it and then replace it with a reaffirmation of the charter or would you want specifically to have all the rights in the charter written in a separate section and replace section 16; in other words, not the charter going in but just the rights, equality section 28 and so on? What is your one-shot fix that you think would be most important for you?

Ms. Grills: We have had a long discussion, and the one that everyone seems to have more consensus towards in our organization is the one put forward by the ad hoc committee, "does not derogate or abrogate from." We worked very hard to acquire that list in the original charter and it was not solely for women that we spoke when we went on the Hill. There were other people we had wanted to add who did not get added. It is still a concern that an identifiable group is not protected from discrimination. We had hoped, in the course of time, those people might be added as new identifiable groups emerge and convince the majority that they are entitled to nondiscrimination.

At this juncture, we really seem to favour such a clause and not to have it appear, as section 16 currently does, that there is a tier, that this group is more important.

If we are speaking of equality, then I think we mean equality for all, because if that had been a boy child, we would have had the same conversation in my family about his opportunities. He might want to be a full-time parent or a househusband, and perhaps in 20 years' time, because of the equality provisions, we could in fact examine our own lives and make different decisions from the ones we currently make. It seems to me "equality" means solely that--that we are, in fact, all equal in this country.

Mr. Faubert: I am new to this process. I am actually subbing today--the members of the committee might understand this--but I think I am as interested as any member of this Legislature in the exchange here, and I welcome you.

This is one of the issues that I have had to grapple with. I do not want to be cast in the role of the defender of the accord at this point in time, because I too have some questions about how it is to be ratified and how provision is to be made for future amendments, if that is possible.

I am not sure what you are saying specifically about women's rights. Are you saying that because they are not specifically included, they are by

definition excluded? Surely, if we talk about equality of rights for all, we mean just simply that.

Ms. Grills: Do we?

Ms. Hutchinson: There is a qualifying clause that gives particular concern to particular groups. In clause 16, it identifies some groups and by identifying some groups, perforce leaves out others. If that clause is required to strengthen the rights and makes sure those rights are there for those particular groups, then why is it there? Why is it required for those groups and not for others?

Mr. Faubert: One of the dangers of even having such a clause is there is an impression that those who are not included in that list are therefore excluded.

Ms. Hutchinson: That is right.

Mr. Faubert: But when one talks about equality of rights for all, I assume, perhaps wrongly, that women are included in the term.

Ms. Hutchinson: We have made that mistake before.

Mr. Faubert: Because we have worked towards this in principle in law and in principle in legislation across Canada, that when one talks about equality, one is inclusive of women's rights as well.

Ms. Hutchinson: That is what we thought in the definition of "persons" under the original British North America Act, but that one had to be fought out. So our trust is not there that "all" includes all of us.

Mr. Faubert: OK, but women were not even considered as persons at the time of the writing of the BNA Act.

Ms. Grills: That is quite true.

Mr. Faubert: Subsequent law has established that indeed they are, and therefore when one talks about "persons," one indicates all genders.

Ms. Grills: I think the reason we feel so disquieted by this is, what will a judge do? A judge is not party to any of the discussion that has gone on. A judge is not party to the intent of legislators. The judge will look at the law, and we feel extremely wary. That was one of the reasons we fought so hard the first time around to be included and to have all those other groups included. Not meaning any slur on the judiciary at all, but we cannot afford to take the risk, in our view.

Mr. Faubert: I understand what you are saying, but one of the principles, I understand, of constitutional law is that it is written in legislation and then established in the courts. There are schools of thought that indeed the courts are now becoming our legislators. If that is the argument you are making, I think you are on pretty firm ground with some constitutional experts on this.

I appreciate your comments. This has clarified something in my mind as to how you view it, and that is really what I am looking for.

Ms. Grills: I think we view it from abject terror. I think I said

that once before. Again, we would prefer to be able to go to court using the charter and not have to test out Meech Lake, spend all that time and then after that, if we are in fact equal, hit the courts under the charter.

Mr. Faubert: Thank you. I can appreciate that.

1000

Mr. Chairman: Thank you very much for coming in this morning.

Ms. Grills: May I say one more thing?

Mr. Chairman: Yes, please.

Ms. Grills: There has been talk of a companion clause and we have discussed that at length. Our feeling is that if, in fact, a companion clause is required, then that is a clear indication there is something wrong with Meech. We are not companions; we are partners. We would very much not like to see something like that happen. We would like to see Meech amended.

Mr. Chairman: Right. Your reference there to a companion clause, companion resolution, that kind of suggestion, is that, in your view, if you need to do that, you would prefer that the accord be directly amended?

Ms. Grills: Yes.

Mr. Chairman: That has been discussed on a number of occasions.

Mr. Allen: Could I ask for a quick answer? If it appeared in the balance of the Legislature and the way things were going that the accord was about to be ratified, would you still not want us to try to get a companion resolution which would at least state the fact that the Legislature, notwithstanding the fact that a majority, whoever that majority is, is supporting it, none the less believes that this issue is so important that the ministers have to immediately address it?

Are you telling us you would not want us to do that at all?

Ms. Grills: I think it would cloud the issue in court, frankly. I suppose, in some way, that would be required to go to a court, that intention, but that would only be the intention of the Ontario Legislature.

Mr. Allen: There are devices we have and can use to get that before other legislatures.

Ms. Grills: We, frankly, would prefer that you spend your time and energy convincing your caucus colleagues that it must be amended.

Mr. Allen: Oh, yes, and I think those of us on the committee intend to try to do that, but the question remains, "If, at the end of the day..." One always is in that position, or often is, in the Legislature.

Ms. Grills: We really cannot see much good in a clause like that. It is a clear admission that there is something wrong with Meech. It is a clear admission, and even if you could get the other 10 legislatures to agree with that, then they are also admitting that they should have done their work prior to.



Mr. Allen: I guess what it is also saying is that sometimes there are things which, in the political process, are not immediately fixable but can be fixed at another date. Do you want more or less political pressure around that option as you go through the process?

Ms. Grills: There is only one Legislature we can count on as Ontarians, and that is this one. We really do hope you will use all your force and your passion and any means you can to convince the Legislature to go back and try to amend this. I simply do not see, when all of these nine premiers who are left are saying, "We believe in equality," that this cannot be fixed.

Mr. Allen: It is a reasonable last statement.

Ms. Grills: Thank you very much for your time.

Mr. Chairman: Thank you.

Ms. Grills: Go forth and amend.

Mr. Chairman: I next call Professor Tony Hall, of the department of native studies of Laurentian University and a member of the Canadian Coalition on the Constitution. If you would be good enough to come forward, we welcome you here this morning, Professor Hall. We have received three documents which you have presented, one to the joint parliamentary committee, one to the Senate task force and an article from Le Voyageur.

Dr. Hall: No, there are several articles.

Mr. Chairman: Several articles, yes, right. Sorry.

Dr. Hall: Describing our work in Sudbury, primarily.

Mr. Chairman: Yes, very good. Thank you. Let me then, without further ado, turn the microphone over to you. Please go ahead and make your presentation and we will follow up with questions.

DR. TONY HALL

Dr. Hall: Thank you, ladies and gentlemen of the committee and Mr. Chairman. It is a great honour to be here. Thank you for including me in your proceedings.

I have produced a couple of written submissions to the federal level of government, which you have. I thought today I would speak extemporaneously.

These are interesting times. I think what is going on in Saskatchewan has brought into focus some of the issues we are concerned with here, so I will endeavour to look at what has happened today, yesterday, last week, and try to put that in some sort of context with what is going on. Obviously, the real frustration in all of this is to try to include or get a sense of what is at stake here.

We have been a colony until 1982, in a sense. We have not had to deal with these issues. They seem so theoretical and far removed from many people's lives. Something, it seems, has to go wrong before we realize what is at stake here. My endeavour is to try to show how family-significant these matters are, not only to the people in the committee but to whomever might be reading this transcript or seeing it over the airwaves.

We hear the phrase, "The spirit of Meech Lake." What is the spirit of Meech Lake? Stan Graham, the Progressive Conservative member of Parliament for Kootenay East-Revelstoke, "said that Mr. Devine's legislation is perfectly within the spirit of the Meech Lake accord in that it allows the province to 'accommodate' its linguistic minority as it chooses." I am reading from the Globe and Mail of April 7.

Yesterday in the Toronto Star, Premier Robert Bourassa expressed the following, having met with Premier Getty of Alberta: "Mr. Getty was expressing an obvious fact, with which I am in agreement. I take care of language questions in Quebec and he takes care of language questions in Alberta. That is a self-evident fact." I think this is the spirit of Meech Lake, the idea that we have 11 sovereign provincial governments that will take care not only of language but everything possible beyond a few things which require a national government, such as defence or currency.

The question I begin with is, if we are to treat language as exclusively a provincial issue, as Mr. Getty, Mr. Devine and Mr. Bourassa seem to want, what is left at the national level? If language itself, the most basic communicative tool that we have as a people, as an emerging self-governing people of Canada, if we cannot consider this to be truly a national issue of concern to all Canadians and of paramount concern for the national government, what is the national government there for?

My argument, my concern, and I guess the word "fear" has been used, is that the spirit of Meech Lake is one which would see a kind of dismantling. In decentralizing authority, it would see the national government increasingly made impotent and people increasingly concerned only with the provincial legislatures as the key focus of decision-making.

In saying this, I witnessed some of your earlier proceedings and I was wondering how I would relate to you. I am full of a sense of indignation, of having been cheated, and here you are, the government. In sort of rehearsing this in my mind, I thought of taking that approach, but in a way, you are as much outside of this process as I am and in a way you are more humiliated by this exercise than some of us others are.

#### 1010

What does it say of our democratic system of legislative values when the chief executive officer tells you: "Look, go and hear the people. Give them a chance to spout off whatever fury they might have, but I am not changing a thing"? Does that make you sort of glorified flak collectors?

You are elected representatives. You are the legislative essence of what this self-government in Ontario is about. I would suggest to you that it is extremely important what you do in the future on this matter, that you assert that legislative authority of yours and make it clear that government in Canada is not to be understood as simply an exercise in executive authority and that the legislatures are going to be more than simply glorified nominating conventions. Once you get that legislative power, the legislatures become increasingly relevant. I encourage you to live up to the tremendous responsibilities which are before you.

In this town--Professor Allen is gracing us on this committee and the chairman, I understand, is a student of Ramsay Cook--many of you will be familiar with the "Canada first" movement. I would describe the increasingly dwindling and embattled proponents of the Meech Lake accord as proponents of



the "Canada second" movement: provinces first, Canada second and, to complete this logic, people last.

As we speak, Prime Minister Mulroney, Premier Devine, Premier Getty and Premier Bourassa are in the west trying to hold this thing together. I think it is very interesting that these three premiers are the premiers who have already pushed through Meech Lake without any--well, there were some public hearings between Meech Lake and Langevin in Quebec, but the western premiers had no public consultation whatsoever. The western premiers certainly are not in favour of shoving French down people's throats, but the western premiers certainly saw nothing wrong with shoving Meech Lake down the throats of their constituents.

I think the great people of Alberta and the great people of Saskatchewan deserve much better and they deserve much better than this really--the word "disgraceful" comes to mind; my father is in the audience and he is going to be a good check that I keep myself moderated--but the great people of Alberta and Saskatchewan deserve far better than this sorry display of supposed leadership which their elected executive officers are giving right now.

It is interesting that these three premiers are also the three premiers who are pushing free trade the hardest. Devine is actually, I might say, Mulroney's hit man on free trade, and bashing Ontario and now bashing Toronto is the level of promotion for this free trade deal. Is it not interesting that the three who have approved Meech Lake in their legislatures are also the three pushing free trade? I would suggest that is not coincidental. In my presentation to the Senate, I made the point that free trade and Meech Lake are obviously connected. They are part of a deregulatory, privatizing thrust, and Mr. Bourassa said as much. Did I put on the record that I developed this in my Senate presentation, the connection between free trade and Meech Lake?

Since that time, on April 1, in the Globe and Mail, Premier Bourassa, in responding to former Prime Minister Trudeau, said as much; that in his mind free trade and Meech Lake are connected. He says, ??"Canada is not the only country where cultural decentralization is happening to offset the effects of economic integration. The free trade agreement underlines a trend towards economic interdependency. To create a balance, we see centrifugal forces develop in the social and cultural fields and, for Quebec, that is very important." So he is declaring that, in his mind, Meech Lake is the other side of the Mulroney-Reagan trade accord.

What is the spirit of Meech Lake? I would suggest to you that the spirit of Meech Lake is one that would see a dismantling and an undermining of our national institutions and a decentralization in order to accommodate a more continentalist approach to our economy, to our politics and to our cultural policy.

I would suggest to you that this is undermining our national institutions. We are seeing this with the disgraceful undermining of that great institution, the CBC. The Honourable John Crosbie, I think in a really slanderous way, slammed the CBC in slamming Torontonians. Since he is setting the tone of the debate, if opponents of the Mulroney-Reagan trade accord are dinosaurs, then I guess politicians of his ilk are dodo birds; I thought they were extinct.

I think that the Meech Lake accord is uprooting; it does not show a continuity with our constitutional traditions. I would argue that our Constitution really is best understood as rooted in the broad facts of



history: What happened? How did we get here? It is not to be understood in some wording that some chief executive officers made over an evening or two evenings. This is a kind of instant-fix approach, which is just not satisfactory. I think we are seeing a sense of betrayal; witness after witness is bringing to you the ramifications of doing it this way.

Believe it or not, this is simply the preamble; but I am making the argument that the constitutional facts of the matter are to be understood in our history, not in an overnight bargaining session.

I would like to look a little bit at the Saskatchewan language situation. Here we see a debate about the nature of rights: Are these French language rights pre-existing? Do they pre-exist Saskatchewan; were they always there but denied consistently through all that time? Or can rights be doled out? Can Premier Devine dole these rights out?

I would suggest that the proper way to see rights is that they exist; they are inherent. Governments can present obstacles to those rights or they can help the realization of those rights. I think that is how we are to understand French language rights in Saskatchewan; they were there all along. Premier Devine's legislation is in a sense what we in Indian Affairs call a termination policy; it says: "Let's abolish, let's wipe out that right. Let's wipe the slate clean. But we promise to be good boy scouts. We are good kind of fellows and we will try to get services going."

What are the implications of saying that to a group? The number that is being used is 25,000; it has no electoral force to mention. The reason they are so small in number is because those rights have been denied so long. To hear people using their small numbers as a weapon, to say that it is crazy that their language should be recognized as equal in Saskatchewan when they are so small in numbers--there is a kind of brutality to this, after a historical process that has diminished those numbers, for people in the wake of that to take up that kind of argument.

How come there were those French language rights in the foundational documents, in the constitutional foundation of Saskatchewan? How come they got there? They got there because of maybe 200 years of experience of living human affairs, but it really took Louis Riel to assert those French language rights. It took the creation of a provisional government. It took very extreme measures on the part of the Metis and their collaborators in the Roman Catholic church to force that recognition into the founding constitutional infrastructure of the Northwest Territories government, which was the first layer of Canadian jurisdiction after the Hudson's Bay Company was in charge. I think this leads very nicely into consideration of the Northwest Territories and what Meech does to the Northwest Territories. I think you have been very conscientious in exploring that and my sense is that you understand very well what is at stake here.

## 1020

It is absolutely unacceptable to say that the residents of the Northwest Territories, in the Constitution, have absolutely no say over their constitutional future, over when they become provinces, if they become provinces, how they become provinces and whether other provinces are extended into their territories, that the people in that homeland have no say and that people outside that jurisdiction, politicians whose constituents are overwhelmingly in the south, have exclusive say; that is unacceptable.

It does not matter if you are a federalist or if it is sovereignty-association. If you believe in democracy, you cannot accept that and it has to be changed. The unanimity provisions of this really cannot be accepted. The federal institutions are not a creation of provincial jurisdiction and a higher provincial sovereignty. The federal institutions exist in and of themselves and they must have some recognition of their sovereignty and some ability to adapt and transform themselves, with an exercise of their sovereignty or the federal sovereignty with perhaps reasonable support from some of the provinces.

This was what Louis Riel was all about and what he was saying in 1869: "Look, Canada, you may have bought the country from the Hudson's Bay Company. You may have paid £300,000, but we are people. We have human rights. We have some right to say what goes on in our own territory." He made that point and he was the founder. His people made that point of Manitoba. That is why there are those recognitions of the French fact in the founding documents of the Northwest Territories. We are going right back to 1869 if we do that to the Northwest Territories.

If there is anything that should unite us as a people and is at the very cutting edge of how we see ourselves, it is that territory. That should be the celebration of our evolving sense of self-government, of our enlightened sense of democratic principles. There is where we have a clean slate where we can put something ennobling in place. In that betrayal of the people of the Northwest Territories, only 80,000 people are involved. I guess the political calculation is made that you can get away with that. That is the whole spirit of Meech Lake: If you are weak and you are not a big, powerful electoral constituency, you get annihilated in a sense. I saw that all too well at four years of first ministers' conferences on aboriginal rights, which I am coming to.

What happened to Louis Riel? Louis Riel was hung in the district of Saskatchewan in Regina: Queen Victoria, Regina, former Pile O' Bones. He was hung and it appeared to the people of Quebec that Orange, Protestant, English-speaking Ontario was trying to exorcise, to do away with the French, Catholic, aboriginal spirit of the west. A Conservative government hung Louis Riel, assassinated Louis Riel, and the Conservative Party has taken the implications. Along with Louis Riel, there were eight Indians who were hanged at that time.

I know the time is running short, but you have to allow me a few minutes to get to what is my inspirational heart and soul, the aboriginal rights issue. This is foundational. This is not some kind of marginal thing we can put off until another day. We have had it since Columbus.

How do we understand the country when we have gone through this process for four meetings over five years and seen the first ministers say publicly, on television, "We cannot put things, when we do not know what they mean, in the Constitution"? The most outspoken one in this line of reasoning was Grant Devine: "We can't as far as to say that aboriginal communities have the right to determine their own future, to just make a declaration of that in the Constitution." If existing aboriginal and treaty rights do not even include that basic democratic right, which we take for granted for everyone else--self-government is what we are talking about here--what do they include?

Grant Devine is in a province where less than 10 per cent of the population produces more than two thirds of the prisoners in jails. Way more than half the people in jails are native people. If you remove this



constitutional negotiation process, as Grant Devine advocates, as Grant Devine wants to terminate French rights--and we saw him trying to terminate aboriginal rights and deny them and glibly talk about, "Gee, we didn't check it with the town councils and the municipalities, and we have to do all these things"--you are left with a situation where the prison in Saskatchewan is the primary institution of relationships between native people and newcomers.

If we want to speak to the Palestinian question, if we want to speak to South Africa, what strength do we have when such a situation exists, and not only exists but is constitutionalized; even the possibility of more meetings outside the realm of what is in the Constitution.

This is where the sense of something really terribly wrong comes for me, for people I know, for my family. Others have been coming at it from many angles. There is something very wrong.

The last point I want to make is language. Cree is probably as living a part of the life of Saskatchewan as French is. Unfortunately, Ojibway and Cree are not as big a part of the life of Ontario. However, they are living languages, and they are the only distinct languages we have in this country.

Who is speaking for Canada's distinct identity? Who is going to promote these languages? If aboriginal people cannot have governments, which the first ministers have told them, who is going to preserve, let alone promote, those languages?

Preserve--what a terrible word. What a way to put people in the category of museum artefacts. "Let's write down their language, put it in a dictionary, put it in the archives, and we won't let anybody take it out because it might not be preserved." Languages are used. Languages are articulated.

What about aboriginal languages? What are the implications of taking French and English and raising them and saying that is the only fundamental characteristic of the country, the French and English languages? We have marginalized constitutionally yet further the only distinct languages of Canada.

J'ai l'impression que le peuple québécois ne veut pas que son accession aux droits aille à l'encontre de l'humanité des peuples autochtones. J'ai l'impression que le peuple québécois ne veut pas que son accession aux droits dans notre constitution canadienne minimise les possibilités des peuples des Territoires-du-Nord-Ouest et du Yukon.

To my way of thinking, the people in Quebec rejected sovereignty-association, but there was a good body of people who voted yes, nevertheless, and I am becoming increasingly of the view that the people outside of Quebec are in a position now to also reject that view of Canada, to assert one Canada, to assert a strong Canada, and their referendum--our referendum--will be to reject this Meech Lake accord, or at least to see it as an opening step in a process, not the culmination of a process.

Mr. Chairman: Thank you very much for a very interesting and passionate presentation. While we did not have to call upon your father, as you suggested we do--

Dr. Hall: Is he still in the room? Has he left in horror?

Mr. Chairman: He would feel very proud, I think, of your presentation.



Again, you have underlined a number of the issues, not only the aboriginal issues but also your view, really, of the theme and the intent of the accord. I think that came through loud and clear.

1030

I wonder if I could just start the questioning with respect to the aboriginal question. When the discussions failed shortly before Meech Lake came about, I think there was a feeling among many people that we were very close to an agreement. This has come up in some of our discussions with other witnesses. You were involved in those discussions. What was your sense of how close we were in 1986 and 1987 to getting agreement on the aboriginal round, and how would you see us getting that started again?

Dr. Hall: How close? Not very close in one sense. This is really what is being debated in Saskatchewan: Is the French right there one that pre-exists Saskatchewan, that was there all along and that Grant Devine is now terminating with promises that he will be a good boy scout and try hard in the future? That would be a kind of delegated right or a right created by Grant Devine.

To come back to the aboriginal issue, there were only two provincial first ministers who took the position that aboriginal self-government was an inherent aboriginal right, which of course was the position of all the aboriginal groups. They were Premier Pawley of Manitoba and Premier Hatfield of New Brunswick. Beyond that, there were Premier Peterson, Premier Buchanan and the man from Nova Scotia, who would have taken the position that aboriginal self-government could be negotiated and there would be some sort of commitment to do that as some sort of delegated authority.

To ask aboriginal people to agree to that was in a sense to ask them to say, "OK, we agree that you can terminate our aboriginal rights on the promise that you are going to kind of delegate some written specific rights." The extent to which aboriginal groups are willing to do that kind of thing or make those kinds of huge compromises, I guess remains to be seen. However, for Premier Devine, Premier Getty, Premier Vander Zalm and Premier Peckford, this was just way out of the ball park.

I have said this at every presentation, and for some reason it is not picked up on. Premier Getty said: "What did Albertans get out of Meech Lake? What's in it for us?" He made the point on June 8--and I picked this up out of the Edmonton Journal; it was in an editorial there--that before Meech Lake, 50 per cent of the population centred in seven provinces could have forced Albertans to observe aboriginal rights. He made the point, "Gee, we might have had to separate if that was the case, if they actually forced us to observe aboriginal rights." This is what the media picked up on. He said, "After Meech Lake, we don't ever have to observe aboriginal rights."

When you call it the Quebec round or the aboriginal round, that is terminology that misleads. The so-called Quebec round affects Quebecers, it affects women, it affects native people and it affects ethnocultural groups. It is convenient for government to invent these terms. In a sense this is the big lie of the Meech Lake accord: "Just put this in place," we are told, "and all these other issues we can take care of later."

With that unanimity provision, you cannot reform a federal institution without the unanimous consent of all the provincial legislatures. How else is aboriginal self-government going to be implemented, involving not only that

but involving some kind of basic reform in federal institutions? That is why Premier Getty, I would imagine, said: "We don't have to observe aboriginal rights because we have got the federal government. The federal government cannot make the kinds of adaptations that would really be required if aboriginal self-government were to become a real, far more powerful fact than it is in Canadian affairs."

Mentioning the prisons, there is this side of things. I just want to say that at these first ministers' conferences, the aboriginal leadership was most eloquent. There were visions of Canada expressed by Zebedee Nunguk, Georges Erasmus and others that go beyond aboriginal people; it is an all-encompassing vision of the country. We need that vision and we need to have some constitutional basis for visions like that to be part of this great country that we have been blessed to be born in.

Mr. Harris: Just a supplementary on that. My understanding is that aboriginal self-government does not require unanimous consent; it requires that it would be subject to the same formula.

Dr. Hall: You could put the words "aboriginal self-government" in the Constitution, but now, what is the situation? Who speaks for Indian people or aboriginal people in the federal government? Indians and lands reserved for Indians are a federal matter. Who speaks for that constituency? The way it is set up now, the Minister of Indian Affairs and Northern Development speaks for that constituency, represents that constituency in the federal Parliament. In the provincial parliament it is a little more informal. Ian Scott theoretically represents that constituency.

The Minister of Indian Affairs and Northern Development is not elected by Indian people. He is in no way accountable to Indian people. In fact, the structure of the Indian Act is that bands and chiefs are accountable to the minister of Indian affairs, not to their own people, and this is obviously unacceptable. This is 19th-century British imperialism at its finest. There is a lot that was good in 19th-century British imperialism. There were treaties; Louis Riel made sure of that. We have to reform those federal institutions in a way that allows aboriginal people some sort of representation that is directly accountable to them.

Mr. Harris: That is fine. I am not convinced Meech Lake changes that. I understand your problem and I do not disagree with what you say.

Dr. Hall: Aboriginal people are very few in number, just as French people in Saskatchewan are few in number. They cannot make their voices heard very well in the electoral process as it is now set up. They are few in number, they are diffused across the country and there are many nationalities. It seems to me we would have to reform the representation process so that aboriginal people could exercise their franchise in a way to select aboriginal candidates and aboriginal representatives. The one-person-one-vote system basically counts aboriginal people out of the electoral process; so we lose the ability to adapt ourselves in that way and, to my way of thinking, that is extremely significant.

Mr. Harris: But no more or any less than before Meech Lake.

Dr. Hall: Oh, yes, powerfully worse, because you have to have unanimity--not seven provinces, unanimity--to reform the representation process in the federal Parliament, for instance.



Mr. Harris: Oh, I see. OK.

Mr. Allen: There are so many points that you have raised that it is almost impossible to begin in the time we have available. I would just like to observe that there is a certain tension in your presentation between, on the one hand, a rootedness in people, which requires significant decentralization--and you, of course, recognize that with regard to native peoples and their right to self-government--and therefore, by extension also, it is necessary for us to have governments that have some authority over different regions or parts of the country that we call provinces.

Therefore, there is a certain sense in the politics of the nation where at least there is a protocol that Mr. Bourassa and Mr. Getty have to observe when they talk in public that the one does this and the other does that and so on. In a sense, there is a certain game there that one perhaps obviously puts to one side and says, "This is ceremony and it is not particularly substantial, but none the less, it represents a certain important element that is necessary in a democratic system."

1040

We all know about the discussions of whether we have a national identity that is coherent and homogeneous and total or whether it is more generally expressive of limited identities across the country and so on. I suspect you are very sympathetic to expressing those limited identities in a variety of ways, so I will not ask you to comment on that.

Dr. Hall: Yes. The supervisor of my thesis was J. M. S. Careless.

Mr. Allen: Yes, exactly. But there are real tensions there that we have to wrestle with when it comes to so-called constitutionalizing.

But I still do not get, I guess, a very clear response from the chairman's first question, and that is, how close did we get? It is very easy to define whether there is an inherent right recognized by some premiers or a pragmatic recognition of something that can be said on the other that uses words that make some things possible by others. At the same time, none the less, one still has to have so many votes, whether the philosophy behind the vote is one way or another in terms of an amending principle.

Given that we at least have had some significant assurance in the committee that the unanimity principle does not apply to aboriginal self-government, I come back to the question, how close did we come and what difference would it make for Quebec to be there, since personally I think we seem to be in a way of stepping our way through the constitutional problem instead of resolving everything all at once, which I suspect would be your preferred way of doing it.

Dr. Hall: I am going to back up. This is quite a lengthy prelude to the question: states' rights versus federal or Dominion or central rights or responsibilities. Let us look at the United States. States' rights meant, for a time, slavery in some states. That is what states' rights were about. As late as the 1950s, states' rights meant Jim Crow laws. People in the local areas in the southern United States felt it was quite all right that coloured people should go to the back of the bus. They had legislatures that were willing to assert this detail and a thousand others like it.

I would say that, looking at the Canadian situation, provincial rights, the claims of provincial autonomy, have consistently gone against the claims



of aboriginal rights. I have left in the record the St. Catharines milling case, where Ontario tried to fight and successfully did fight the federal government by arguing that aboriginal people had no governments, were primitive and nomadic and thus had no claim to any resources; thus, the treaties were of no meaning.

That is why Premier Lougheed and other premiers wanted aboriginal and treaty rights out of the 1982 constitutional deal and got them out of there. The federal government agreed to it. There has to be, ironically, a strong federal authority ready to assert the rights of aboriginal people in a country such as ours, so provincial governments have no monopoly on claims to regional autonomy and cultural diversity.

For some minorities, and aboriginal people are the classic example, it requires a strong Dominion or federal government to enable people to realize their cultural diversity and their local autonomy. That goes right back into the British Empire, when it was the central authority of the British Empire which asserted the necessity for treaties and which made the royal proclamation of 1763.

In a sense, I even had some trepidation in coming to speak with this body, because this is really a federal matter. Indians and land reserved for Indians are a federal jurisdiction, and the federal government has to assert that jurisdiction. This particular government does not want to upset the provinces on any number of counts, and we are seeing the chaos this is creating nationwide as a result. It is really a matter of a federal authority having the courage to stand up for aboriginal rights, and only a federal authority can do that. Provinces have to be good neighbours.

Mr. Allen: But if it is a case of courage, then courage can be asked for anywhere, presumably. If it is a question of courage, then all you are asking is that provincial premiers be courageous too. That is not a constitutional question surely; that is a question of political will. The federal government under the Constitution could just as easily totally abdicate anything responsible with respect to native people.

That could happen under our Constitution. What we are talking about in a federal system is not surely--

Dr. Hall: That did happen at Meech Lake. That is exactly what happened. They abdicated Indian rights. That can always be cut out. It was cut out on November 5, 1981, quite literally. Now we know, or the rumour has it, that it was Premier Pawley who insisted that there be some sort of reaffirmation of aboriginal rights in section 16. Rumour has it--and since we have no transcript to go on, it is fair game to report these rumours--that it was Premier Peterson. It was not he who was going to assert aboriginal rights. He was getting the pressure from the Italian community in Toronto and wanted to reaffirm multiculturalism.

The premiers in there apparently said: "We don't want to see the word 'Indian.' We don't want to see the word 'aboriginal' in this document." That is why section 16 has that peculiar wording, which refers only to other acts.

Mr. Allen: My question, though, was whether Quebec would make any difference.

Dr. Hall: It will certainly make a difference, but I remind you that Robert Bourassa was the Premier who sent the bulldozers and the work crews

into the homeland of the Cree without so much as a courtesy letter to say what he was doing.

It was Judge Malouff, a Canadian of Lebanese ancestry, whose judgement kind of forced him into some sort of negotiations. Robert Bourassa, strategically, is forced into a position where he has to make some kind of accommodation with the Cree, and he continues to do so. But that is not to suggest that Robert Bourassa around the table is going to be a great friend of the Inuit in Nunavut. This is one of the duplicitous views or opinions of the Meech Lake accord which usually gets passed off by the responsible people without the appropriate questions being asked.

Mr. Allen: So you think you would vote no?

Dr. Hall: No for what?

Mr. Allen: On the very question that was put in the March meetings at the aboriginal round.

Dr. Hall: There was nothing put. There was nothing tabled.

Mr. Allen: People were counting heads as to who was going which direction. I am just asking you which way would Mr. Bourassa go in that setting?

Dr. Hall: Mr. Bourassa would go in the direction of standing up for provincial autonomy and exclusive provincial jurisdiction in provincial lands, as most every other Premier can be expected to, not because they are nasty people who do not like aboriginal people and do not appreciate them, but because the British North America Act and the way the BNA Act is written up kind of force them into that position. It sets aboriginal and treaty rights as the opposite constitutional pole to provincial rights.

The federal government must assert its authority as some sort of mediator and, indeed, advocate and vindicator of aboriginal rights in between.

Mr. Allen: Thank you.

Mr. Chairman: Professor Hall, I feel we could spend a whole day talking, particularly about the whole issue of aboriginal rights specifically; so I am glad that you brought with you, so that we will have as part of our record and can share with our colleagues, the two presentations, in particular, that you made to the Senate committee and to the joint parliamentary committee.

I think that, as you are aware, in the presentations which have been made by a number of aboriginal groups, many of the points that you have made, needless to say, they have also made. Out of the testimony that has come before this committee, I think the views of aboriginal groups and organizations have been put very clearly and very articulately. In fact, I think some of the most powerful presentations have come from aboriginal groups.

I regret that at this point we have a heavy schedule today and I am going to have to close off the questioning. If there is a closing comment you would like to make--

Dr. Hall: Indeed, that should not surprise you, because the aboriginal perspective is surely the deepest Canadian perspective. Aboriginal

people have a deeper sense and a greater experience of these constitutional questions. It does not go back only to 1982; it goes back to their negotiation of treaties and it goes back to the days of the American Revolution. mean, native people have a tremendously important perspective which can enrich us all.

The recognition and affirmation of aboriginal rights is not something which diminishes our strength as a nation. It enormously affirms and promotes our soundness and our integrity as a nation. I do not think you should be surprised at all that aboriginal people have been bringing you such insightful, important presentations.

1050

Mr. Allen: Thank you.

Mr. Chairman: Perhaps it is not that we were surprised, but we were just underlining that the briefs that were presented and the discussions that we did have covered all of the matters. Your testimony this morning has served to underline and to underscore what they said to us.

Dr. Hall: They have done their part and, Mr. Chairman, I expect you and the other committee members will now do your part.

Mr. Chairman: Thank you very much for coming and joining us. If your son had still been sitting there, I was going to ask him for the last word.

Dr. Hall: That is Sam Hall Nabigon.

Mr. Chairman: He was our youngest almost witness.

Dr. Hall: Thank you very much. I apologize to the other witnesses.

Mr. Chairman: That is all right.

I might now call upon Michael J. McDonald to be be good enough to come forward and take a seat at the table. Good morning and welcome, Mr. McDonald. We have circulated a copy of your presentation as well as letters attached to it to Premier Peterson and to Prime Minister Mulroney. If I could ask you to go ahead with your presentation, we will follow up with questions.

MICHAEL J. McDONALD

Mr. McDonald: Thank you, Mr. Chairman and members of the committee. May I say at the outset that I would like to acknowledge the contribution this committee is making to the democratic process. It is not an easy job to sit and listen successively to a number of submissions. I am appreciative of that fact. I would say the inconvenience of that is offset by the vital role this committee may play in terms of democratic principles.

Second, I would like to say that I submitted an original brief early on, back in January, but for reasons that will become apparent, it is not that original brief that I am speaking to this morning but the brief that has been distributed by the clerk of the committee.

Mr. Chairman: We have that as well in our ever-growing files.

Mr. McDonald: I would be happy in questions and answers to attempt



to answer anything that is in either brief, but I will restrict my remarks this morning to what has been distributed.

In my submission, the Prime Minister of Canada and the Premier of this province by their arbitrary action have regrettably brought the integrity of this committee's proceedings into issue.

The Prime Minister of Canada, despite numerous requests for assurances and clarification, has consistently and repeatedly stated that the Meech Lake accord constitutes a homogeneous entity and in these circumstances he is prepared to recommend it in full, as the other prime ministers are committed to do before their own legislative assemblies.

On October 21, 1987, in the House of Commons debate on the accord, he rejected the idea of amending the pact. To quote him, he said, "The government is not prepared to jeopardize this act of national reconciliation by reopening for negotiation virtually every section, as some would have us do."

Regrettably again, the Premier has indicated the same inflexibility. He is quoted in *The Globe and Mail* on January 26, 1988, as saying: "Public hearings on the accord that begin before a legislative committee"--namely, you people--"will not change the government's position that the agreement, despite its flaw, is good for Canada, nor will the government allow a free vote in the Legislature on a resolution endorsing the accord."

I took the trouble of phoning the Premier's press secretary to check the accuracy of that quote, and he assured me that it was substantially correct.

I suppose when you read those sorts of statements you have to look and ask, "Why do leaders of free and democratic governments make those kinds of statements?" In my submission you do not have to look very far. The Deputy Prime Minister, Minister Mazankowski, addressing the House of Commons on June 12, stated:

"In a speech delivered in Sept-Îles in 1984, the Prime Minister (Mr. Mulroney) promised that if his party were elected to office one of his priorities would be to conclude an agreement which would make it possible for Quebec to join the Constitution with honour and enthusiasm. He also stated he would take a different approach to federal-provincial relations, on the basis of national reconciliation."

I certainly am not critical of the Prime Minister of Canada fulfilling what he considers an election promise. I applaud that initiative. However, the people of Canada have every right to scrutinize the legal instrument arrived at and to reject it if they find it wanting in whole or in part. I suggest that the offence being perpetrated by the Prime Minister of Canada is that by negating a genuine public debate on the accord, he is in breach of this country's most basic democratic principles.

By way of somewhat of an aside, although I do not find fault with the Prime Minister's election motivation, I do however take objection to what I typify as his introduction of a bullying tone into such debate. For example, when the Prime Minister of Canada challenges other elected representatives to stand up and be counted--and I think it is unfair to elected representatives to do that--he is obviously doing so, so that he can shoot such elected representatives down, particularly when he is campaigning in Quebec. These bullying tactics are offensive in any elected representative, but particularly offensive for a Prime Minister of Canada to engage in. More important, it

adversely affects the probability of the free and open debate of a national issue.

I note in yesterday's Globe and Mail that Mr. Crosbie seems to be following suit on the free trade issue in terms of language and accusations that I find offensive and not helpful in terms of the debate on that important topic as well.

I am aware that by being open to and allowing amendments to the Constitution, this may result in inconvenience and possibly delay its implementation for a period of time. However, those sorts of considerations, legitimate as they may be, can never take precedence over the public's right to be heard and responded to on an amendment to the country's Constitution.

A previous federal administration, when it enacted the entire Constitution Act of 1981, allowed amendments that were presented in connection with women's rights and aboriginal people after the initial constitutional deal was struck. Is Meech Lake more fragile than the original charter itself? I suggest not.

If that is the motivation of the Prime Minister of Canada, what is the motivation of the Premier (Mr. Peterson) for his inflexible stance? I suggest that the Premier of this province feels obligated, as do the other provincial premiers, by a commitment made at the time of the accord to recommend the accord in its entirety to their respective legislatures. I am not critical of that commitment as such. The Prime Minister of Canada has also been active in reminding the premiers of their solemn promise, seemingly at every opportunity.

It is my respectful submission that the provincial premiers should, if they did not consider it at the time, consider that the commitment they made to recommend also contained an implicit obligation and responsibility to hear and listen to their citizens, to be open to amendments if necessary and to request a further meeting of first ministers to agree on such amendments. That implicit responsibility is, in my opinion, also required by law. I will get into the legal aspect in a minute.

#### 1100

There are also precedents for the premiers to be guided by in analogous situations. For example, in labour negotiations, as I am sure many members of the committee are aware, the negotiating team is also bound to recommend its proposals. However, membership is always free to reject a proposal in such a situation and send the bargaining team back to the table. In the context of the accord, the membership of the provincial legislatures is being handcuffed by party discipline and therefore the application of this precedent is being frustrated. However, if the premiers took whatever steps are necessary to allow a genuine public debate including, if necessary--and I think it would have to be necessary--a free vote in the Legislature so that the members of the public can be truly represented by their provincial elected member, then this analogous situation could apply.

Having in mind the considerable public debate to date on the accord, with a significant number of learned witnesses critical of the accord, one cannot help but think of Lord Acton's famous remark, "Power tends to corrupt and absolute power corrupts absolutely." I realize those are strong words and I am using them not in a limited sense but in a sense that applies in this narrow situation. I feel that they are very much applicable to the actions of the Prime Minister of Canada and the Premier of Ontario in denying the opportunity for genuine public debate, and I say that with some regret.



Since the integrity of this committee's proceedings has been dealt, in my opinion, a fatal blow by the Premier of the province in stating that its recommendations will not change this government's position, I submit that it is futile for me to speak to the merits of the accord, and I decline to do so, although, as I indicated, I would be happy to answer any questions.

What is the relevant and real issue then? The relevant and real issue to be addressed by this committee, by all members of the Ontario Legislature, by all members of the other provincial legislatures, by all members of the House of Commons and the Senate and indeed by every thinking citizen of Canada is the right to free and open debate. It is urgent to request and, if necessary, to compel the Prime Minister of Canada and the provincial premiers to cease and desist their arbitrary behaviour on this matter and publicly declare that their respective governments are going to listen to public opinion and make such amendments to the accord as are deemed necessary and reasonable.

In this connection, I have this morning forwarded a public letter to both the Prime Minister of Canada and the Premier of Ontario making such a request and, as you know, those letters are attached to my brief.

I think it is important to place this arbitrary behaviour in a proper context and I draw your attention to the preamble of the Constitution Act itself, which reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

"Rule of law" is to many people a nebulous phrase, and I think it is probably best summarized in a very, very old quote by Bracton, somewhere between 1200 and 1278. It is a quote I am sure you are familiar with. He said, "The king is under no man but under God and the law." I would like to paraphrase that phrase because I think it is applicable here. My paraphrase is that first ministers are under no man but they are under God and they are under the law. The preamble of the charter says that the rule of law applies, and I suggest therefore that the Prime Minister and the first ministers have to pay attention to that.

Section 2 of the Canadian Charter of Rights and Freedoms states: "Everyone has the following freedoms:...(b) freedom of thought, belief, opinion and expression."

I suggest to members of the committee that those words are completely empty if all the freedom I have and indeed all the freedom you have is to listen and to write a report and for that report, despite your considerable efforts on behalf of the people of Ontario, to fall on deaf ears, on a government that has a predetermined agenda and is not willing to listen to anybody no matter what. Implicit in those fundamental freedoms is a government that is prepared to listen to and to respond to thought, belief, opinion and expression. Otherwise, they are not really rights, in my respectful submission.

Section 7 of the charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

As I will demonstrate, one of the fundamental parts of liberty in a society that we think we live in is genuine public debate, and genuine public debate means not only the right as I have indicated to expression and opinion but also for elected representatives to listen to those opinions and where appropriate to respond to them.



Section 26 of the charter states: "The guarantee in this charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

That takes us back to all the other constitutional acts, and the one that is most familiar to us is the British North America Act of 1867. I find it ironic, I find it sad, I find it regrettable that I am referring to our relatively new Constitution and our charter for authority in dealing with arbitrary action by the Prime Minister of Canada and regrettably the Premier of this province concerning an amendment to the very same act. The above preamble and sections 2 and 7, in my opinion, guarantee the liberty of genuine public debate. Section 26 as well brings forward all existing law, such as our inheritance of "a Constitution similar in principle to that of the United Kingdom," to quote from the British North America Act.

We have a quote from a former Chief Justice of the Supreme Court of Canada away back in 1938 in the Alberta press bill case, and you would think we have really advanced. Never mind the charter and the Constitution Act, we probably have more rights and a more active, volatile society than in 1938. But it seems to me that Chief Justice Duff at that time certainly stated a position that I adhere to in terms of what it means to be an heir to a British Constitution:

"The statute (British North America Act 1867) contemplates a Parliament working under the influence of public opinion and public discussions. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by ministers of the crown of their responsibilities to Parliament, by members of Parliament of their duty to the electors and by the electors themselves of their responsibility in the election of their representatives--but it is axiomatic that the practice of the right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institution."

Obviously, the actions of the Prime Minister of Canada and the provincial premiers, to date in any event, are contrary to the kind of public debate that the Chief Justice describes. It is no defence to say that committees such as this one and committees set up at the federal level have been constituted and numerous witnesses have appeared. I was in Ottawa two weeks ago speaking to the Senate committee. They are doing a terrific job in hearing witnesses and asking both intelligent and critical questions but, even so, it is no defence to say that those committees are set up, if in fact the government has already announced that it is not going to pay attention to any of those committees, as it has done.

1110

As Duff says, it is the essence of public debate that it flow both ways. A one-sided public discussion with a government determined on a fixed agenda is a sham. If the first ministers claim otherwise, then in addition to acting arbitrarily, they are also acting hypocritically. In my submission, as I have stated previously, their action is contrary to law.

What is next then? Are the Prime Minister of Canada and the provincial premiers above this law? It boggles my mind that I should have to ask this

question but I do. Have we as a nation and our British forefathers before us struggled for 650 years to be free of the arbitrary action of sovereigns only to have it replaced in a period of months by the arbitrary action of first ministers? I suggest not.

The same question was asked by a distinguished British jurist and his response was as follows. I am quoting from *What's Next in the Law?* written in 1982 by the Right Honourable Lord Denning, Master of the Rolls:

"All these powers of the Prime Minister are not contained in any statute. These are said to be so strong that they are part of our Constitution. But I would ask the question: Suppose our future Prime Minister should misuse or abuse the power? Would it be lawful? Would it not be contrary to the Constitution? Would not the courts interfere to stop it?" I suggest they will if they are asked and I may have to ask the courts to do exactly that.

I am hopeful that the Prime Minister of Canada and the Premier of this province will respond favourably to my request. I am certainly not making it just for myself; I am making it for all citizens of this province and of Canada. I suggest to the Prime Minister of Canada and the Premier that they respond within two weeks.

I think it is fair to members of the committee that I spell out what I think appropriate action is, if there is not a public announcement or if there is a negative public announcement. Quite frankly, I am asking for help from everybody; I am asking help certainly from the membership of this committee.

If the Prime Minister of Canada and the Premier of this province answer in the negative, and by negative I mean anything other than yes. Hold on a minute. If it is not clear already, we are open to debate, including any amendments that kind of debate indicates are warranted. If they suggest anything other than that, then I think further action is required.

I intend to ask members of this committee, and not only the members of this committee but also all members of the Legislature and the federal House of Commons, to move a vote of censure, censuring their first ministers. I realize that would be very difficult, certainly for government members, to do but I think there is a very big principle at stake here.

This is only appropriate, since the House of Commons, and the Legislature in particular, in our system of responsible government are ultimately responsible to the people. My source here is Eugene Forsey in a booklet published in 1982 by the Department of Public Works.

I suggest that elected members' responsibility to their electors on this issue is more fundamental than party discipline. If this action is necessary, I will be seeking the assistance of the media to encourage all Canadians to write or telephone their federal and provincial member to express their view on the first ministers' arbitrary action.

I also intend, by open letters, requesting the premiers of the other provinces who have not yet approved the accord to delay taking any further action until the Prime Minister of Canada publicly clarifies Canadians' rights to meaningfully engage in this public debate. I will also be requesting the premiers of those provinces who have approved the accord to publicly state that they have no objection to a delay by the remaining provinces to facilitate genuine public debate and that they are open to amendments if the public debate warrants such amendments.



Second, I intend, if necessary, to petition the Lieutenant Governor of this province and the Governor General of Canada to take such steps as are necessary to secure the rights of genuine public debate of this accord. Again, I will be soliciting the assistance of the media in involving the public in signing the petition to Her Majesty's representatives.

Third--and I stress I hope I do not have to take any of these actions--I intend, if necessary, to ask the appropriate court for a declaration as to whether the arbitrary action of the Prime Minister of Canada and the Premier of this province, in so far as they affect genuine public debate, are within the law.

Last, but not least, I pledge that I will fight this serious threat to our democratic principles with every ounce of energy that I can muster and I will not cease fighting until the rights of free debate in this country are manifestly secure again.

I am hopeful that Canadians in all walks of life will join me in this fight. I would add that this trend to arbitrary action by first ministers seems not to be an isolated incident in terms of Meech Lake, that, with large majorities in both the federal and some provincial legislatures, it seems to be accelerating and therefore it is all the more dangerous and therefore all the more necessary and imperative that this trend be arrested quickly before it gains any further momentum.

In conclusion, I wish to stress to you how distressed I am personally to be addressing this issue at all. As I noted earlier, it is ironic that the issue of arbitrary action by first ministers is being disputed, particularly in the context of an amendment to the Constitution Act and the Charter of Rights.

My only solace, quite frankly, is the words that are contained on the editorial page of one of our newspapers, "The subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures."

I thank you for this opportunity to address what I consider is the most fundamental issue before the country and for your attention throughout. I would be pleased to try to answer any questions.

Mr. Chairman: Thank you very much, both for this presentation and also the document which you sent to the committee earlier. I think it is fair to say that you have raised a number of questions and issues around the accord that I do not think we have focused on in quite the way that you have.

I think, in particular, the quote from former Chief Justice Lyman Duff is a very interesting one and certainly raises a number of questions which have come up in terms of process and one that has troubled us a great deal, not only in terms of the situation we have found ourselves in in dealing with the present accord, but also recognizing that whatever happens to the Meech Lake accord, provincial legislatures are bound to be involved in constitutional change in the future.

We have to give some pretty serious thought to how we ought to be involved and clearly, although I do not think we have said this before, I do not think anyone would want to be involved where something is signed and presented to you for comment after the fact. We find ourselves in a different situation in this context, although I think I should underline that in terms of the process we are involved in, I think there are times when there are



hearings and there are other jurisdictions that are also either going to have hearings or have said that they will have hearings.

It strikes me that on this one, the political process is unfolding and that a lot of things have been brought before this committee as well as other forums. None the less, we listen, we hear and we have to go back and consider this, regardless of what other commitments other people may or may not have made.

1120

We are directed by the Legislature, and I emphasize "by the Legislature," to report back to the House by the end of June. We will probably complete our public hearings later this month or early in May, and then we are certainly going to have a lot of very serious discussion in determining where and how we go. I think you have set out your thoughts quite clearly and we appreciate that. We will turn to some questions.

Miss Roberts: Perhaps I may briefly comment. I appreciated your comments and concerns and the very definite steps you are going to take. I assume you are committed to them. That, indeed, is your right and I look forward to what you decide upon doing.

You have brought up, as the chairman has indicated, a very important part of it, and that is the process itself. Have you sort of thought beyond this particular situation to what the process should be to change the Constitution and how it should really work? When we brought back the British North America Act at the first of this decade, we never really thought about the process, and that process, I think, was one that occurred in a way that was new, maybe, for Canada.

What process should we have now? Should it be enshrined in the Constitution? Should it be enshrined in bills in each Legislature? Have you thought about that?

Mr. McDonald: Yes, I have. The process, as you are hearing all the time, is part of the problem. The process, in my opinion, would have been so much better if the Prime Minister and the premiers had said, "We have negotiated the greater part of 24 hours and we have come up with something we think is going to be good for the country." They have said that, but then they went on--

Miss Roberts: Before you go on, do not think about Meech Lake. Think about any process. You know the charter is flawed. You know the BNA Act has to be changed. You know all those things. Do not think about Meech Lake. How are we going to get at those flawed documents now? Do you expect executive federalism to exist to such an extent that they will set the agenda for us to look at, or do we as Canadians set the agenda as to what should be looked at by them and then returned to us?

Mr. McDonald: There is, in my opinion, the responsibility of elected people to initiate and take leadership, but we are way beyond--as McLuhan points out, everybody on spaceship Earth wants to be crew, and so we are way beyond the point where elected representatives can say, "This is the way it is going to be." There is the feeling that all Canadians want to be involved in fundamental changes.

There are some laws that not too many people express much interest in,

but certainly on matters like the Constitution, all Canadians want to be involved. The Prime Minister and the premiers would have been so much better by stating, "We have done our best and now we are completely open to debate and to amendments if necessary." They did not do that. They took a very hard line and said: "This is it. We have made a deal with Quebec. We got Quebec back to the constitutional table and the rest of you guys had better honour your commitment to Quebec." That is regrettable because it has alienated all sorts of people. Certainly, there were comments by very, very capable witnesses. It is regrettable those comments are not being listened to.

Miss Roberts: You have not thought about any other process to the extent that you can verbalize it today.

Mr. McDonald: I do not think there is any alternative, other than elected representatives taking an initiative but leaving it open for that initiative to be responsible to the comments of citizens from every walk of life. I have not thought of any alternative to that.

Miss Roberts: Have you thought about a referendum? Is that the way this public debate should end?

Mr. McDonald: I do not rule out a referendum. It seems to be, in some people's minds, anathema to our form of government. I think we have to explore those avenues. I think we have to let people express their wishes and desires in those kinds of democratic instruments.

Mr. Harris: I want to congratulate you for taking the time to make the presentation. I enjoyed it and I agree with you, I think the process is severely flawed. This committee has heard a number of witnesses; most, I have to tell you, have zeroed in on the accord itself but some have dealt with the process and the problems they have with it.

I want to ask you one question. Most people get concerned about a process if they do not like the product. In my view, and we seem to be relatively new as a nation in amending our Constitution, particularly since it has been brought home, but through that whole process, this process is, to my way of thinking, probably more democratic than the process we went through in 1982.

I was not very happy with that process either. I am not saying, therefore, this process is OK, but most of the people who have come before us and talked about the process have really condemned the first ministers for the way they went about arriving at Meech Lake. I do not accept the 24 hours; I think that was a culmination of perhaps 20 years and a lot of work and prework that went on with officials, that this is what happened in 1967, 1977 and 1982. I do not think that is a fair criticism to make, even though it culminated in that meeting.

You have not talked in your brief at all about the accord. As I say, most people who have come and talked about the process do so because they do not like something in the accord. Is there anything in your motivation? You have stuck strictly to the process. You do not like it. There has not been public involvement. Are you happy with the accord?

Mr. McDonald: No. As I indicated in my original brief--

Mr. Harris: OK. I have not read it. I apologize.



Mr. McDonald: --the document is simply not written with sufficient clarity to be an act of a Legislature or, indeed, an act of the House of Commons. I hark back to the Fathers of Confederation in the BNA Act. They did not have any preamble. They did not have any accompanying text as such, but they spelled out first the separation of powers, sections 92 and 93, and in section 93 they spelled out that the right to denominational schools would continue, which was a recognition of the French fact at that time in the province of Quebec and of the English-speaking and largely Protestant fact in Ontario at that time.

They went on to spell out in section 133 that the official languages of both the federal House and the Legislature in Quebec were both English and French. They recognized the diversity and distinct societies of the two primary provinces at that time, but they did so in such a way that everybody understood it. It was clear, legal language.

The phrase, "preserve and promote" the distinct society, without supporting examples included in the text, is an object of mischief, future mischief, countless wasted hours of litigation, a lot of private citizens' moneys down the drain, a lot of lawyers who are going to be completely perplexed in terms of giving advice to their clients, a waste of time for a very valuable resource; namely, the Supreme Court of Canada.

It is on that fundamental point that I think the accord is flawed. There are other smaller issues--not smaller issues; there are other issues which I leave to people who have the most vested right. I think it is almost criminal that the Northwest Territories and the Yukon have to have unanimity in terms of being a future province. I think that is criminal.

1130

Why make reform to the Senate only by unanimous consent and, paradoxically, at the same time put it on the agenda for next year's constitutional conference? If the western provinces thought they got a coup on that, they must have not realized they had agreed for that point to be covered by section 42 in the charter.

Mr. Harris: If you agreed with the accord, if you thought it was a good accord, would you still be here?

Mr. McDonald: If I thought the accord was good, yes, I would still be here if both the Prime Minister and the Premier were saying, "This is it boys; we are not listening to any other point of view." If there was a contrary point of view, even if I personally thought it was good, then I think it is fundamental that the contrary point of view be heard and responded to. That is called minority rights.

Mr. Chairman: I want to thank you very much for coming in this morning, both for your focus this morning on the process as well as for your other brief, which goes into more detail in a number of areas.

I regret, again, that time goes by and we still have another witness. As I noted, this committee still has a lot of work to do and a lot of thinking to do and I hope by the time we get to the end of that we will be able to find our way through what is perhaps a landscape of minefields--at the very least, eggshells. Quite frankly, on the testimony that we received, I do not think any committee could have listened to what we have listened to without realizing the seriousness of the issues that are at play here. We thank you very much for joining us this morning.



Mr. McDonald: I am aware of your restraints, Mr. Chairman, and the committee. I thank you for your time.

Mr. Chairman: I will call upon our next witness, Miss Jane Pepino, Ontario representative of the Canadian Advisory Committee on the Status of Women. Thank you for coming. While we are running somewhat late, we will certainly make sure that you have sufficient time to make your presentation and allow us a period of questions.

#### CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN

Ms. Pepino: Good morning, members of the committee, and thank you, Mr. Chairman. As you indicated, I am here as a representative of the Canadian Advisory Council on the Status of Women. Although I am a lawyer, I do not hold myself out as a constitutional expert. You have heard, however, from constitutional experts previously, including, of course, Professor Mary Eberts and Professor Beverley Baines.

The Canadian Advisory Council was established in 1973 on the recommendation of the Royal Commission on the Status of Women chaired by Florence Bird. The council is composed of 27 part-time volunteer and three full-time paid members appointed by the federal government. Collectively, the council represents the regional, cultural, ethnic and linguistic diversity of Canada. I am one of four representatives from the province of Ontario.

The objective of the federal council is to bring before the government and the public matters of interest and concern to women. Thus, the council provides the federal government with advice on both the impact on women of existing policies and programs and the development of new measures to improve the status of women in Canada.

Specifically, and we are known for this, the council undertakes and publishes research on issues of interest and concern to women with a view to achieving needed reform. The council is well known and recognized for its cutting-edge research to benefit thinking in Canada.

We also promote an awareness of these issues through public and media relations and contribute to the development, we believe, of a substantive body of Canadian resource material on women's issues.

I have filed with this committee a copy of the council's brief to the special joint committee that the federal government held in August 1987, which also includes a reference to a resolution passed by all members of council. I would stress for members of this committee that the members of council are anglophone and francophone from the province of Quebec and anglophone and francophone from outside the province of Quebec. All of the members presently serving on the Canadian Advisory Council on the Status of Women have been appointed by this present federal government.

I do not propose to take you through either the brief filed with you or the resolution in detail. You have had a lot of reading to do and you have a great deal to do in future, I am sure. I would like to simply use my time to indicate to you that I will draw now on a brief that was presented by our president, Sylvia Gold, to the present Senate hearings under way, which I believe reasonably and appropriately summarize the concerns of the council.

The first issue I wish to address with you on behalf of the council has to do with the federal process and the Meech Lake accord. Last summer, a

number of national women's organizations, including the council, told the special joint committee that the accord put women's charter-based equality rights at risk. Carol Gilligan, a noted scholar, has stated, "As we have listened for centuries to the voices of men, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak."

When you compare, as I know you have been asked to do in the past, the briefs and testimony of the women who made those arguments to the special joint committee with the response of that special joint committee, it becomes clear that none of us was heard. By this, I wish to make it clear I do not mean simply that the committee disagreed with our views. They in fact did not hear our views and our evidence.

In its September 1987 report, the special joint committee refuted three main arguments it claimed were made by women's groups about the impact of the accord on women's charter-based equality rights. They claimed we had argued, first, that the "distinct society" clause should not be entrenched. The second allegation they made about women's submissions were that gender equality rights should be treated as a special case. The third misleading statement they made was that women argued that gender equality rights should be given a guarantee of automatic paramountcy.

I think a careful review of the briefs presented to the special joint committee and of the committee's report makes it very clear that none, not one single women's organization, ever made any of those arguments attributed to them. The arguments that those national women's organizations did make were never addressed in the report. We would ask the members of this committee to set aside, for those reasons, the findings and recommendations of the special joint committee as they pertain to the submissions of all equality-seeking groups, but specifically those of women.

This committee, as the other was intended to have done, is charged with the task of understanding, analysing, summarizing and relaying the evidence that has been placed before it over these past three months to the Ontario Legislature. Your report represents the last opportunity in this province to correct the record of inattention to and misunderstanding of women's arguments on the Meech Lake accord. I know from my review of some of the transcripts of evidence placed before you that some have gone so far as to say it was a deliberate misrepresentation of women's views. I simply wish to leave it as inattention.

With regard to the history of women and the Constitution, I think it is clear that although women were not present when the Fathers of Confederation got together in 1867, we are no strangers to the process of constitutional renewal. In a sense, it all started by women and with women in the Senate over the meaning of the word "persons" in the British North America Act of 1867, but there is obviously more recent history of women's involvement with regard to constitutional renewal.

1140

For example, in 1978, in the dying moments of a first ministers' meeting, as part of the public session--but one still does not quite know what brought it to that part of the public session--the federal government conceded, in the way of almost a gratuitous offer, jurisdiction over marriage and divorce to the provinces. That immediately provoked and required a substantial lobby by women concerned about uniform divorce laws and enforcement across Canada of custody and support orders.



In 1980 and 1981, women had to lobby twice to secure equality rights in the charter and carried on the struggle to support aboriginal women in their quest for constitutionally guaranteed equality rights. In 1983, women were called upon yet again to lobby to forestall an unexamined proposal to include property rights in the charter. If I may stop right there, I would just like to address in that regard Mr. Harris's question to the previous speaker, that is, "Is the process flawed even if the product is acceptable?"

It is our submission that the process is as important as the product. Even if the Meech Lake accord had been acceptable to national women's organizations and those women in Ontario, we believe still that the process is extremely flawed. I think these four or five examples I have given to you have indicated in a summary fashion why it is.

We are constantly being asked and required to react to deals that are made behind closed doors without sufficient time for public consultation, without sufficient input. I do believe, Mr. Harris, that in 1980 and 1981 women did have a much greater voice on the accord than certainly even, with respect, the previous committees on the Meech Lake accord have afforded us.

In her expert testimony before this committee Professor Eberts concluded that this decade of constitutional activity, at least from the experience of women, can be characterized in a number of ways. I will simply choose two examples.

First, constitutional decisions of great significance to women are made by men without notice to women, without consultation, and, as I think is patently clear from the result, in the absence of any essential awareness of women's interests.

Second, resistance to women's concerns about constitutional initiatives ranges from the patronizing "Trust us," which we heard last summer and last fall, to--when we actually challenged that and brought forward our own experts, and to our great dismay our own examples, the target continued to move--ridicule or misrepresentation of our arguments and silencing. Women are also threatened, as are all Canadians, that if we do not accept the deal as presented, the alternative will be worse.

These characteristics were present in the making of the charter in 1980, 1981 and 1982. I believe they have certainly been demonstrated as being present and paramount in the process surrounding the Meech Lake accord. I am not going to elaborate further here as I am conscious of the time and I recognize that the procedural aspects were thoroughly reviewed for you in their impact and insult to women, in some of the briefs I read in the very early days in February.

I would like to turn now to our specific concerns about the Meech Lake accord, again in summary:

The council's brief, which I have filed with you, constitutes in large part a legal analysis of the Meech Lake accord almost on a section-by-section basis. It is nevertheless also, we believe, an evaluation of the possible consequences of the accord for the women of Canada and for the women of this province, both francophone and anglophone and those who have neither of our federal official languages as their first language, as well as all other equality seekers.

This evaluation is based on--and I stress this--numerous consultations



with council members, with diverse and well-respected women's organizations within Quebec and beyond, with constitutional experts: not only academics but also lawyers, civil servants and bureaucrats, those who are charged with implementing constitutional reform. Of course, it is also a result of significant and nationwide consultation with those women who toiled unremittingly in 1981 to secure equality rights for women.

Before I go further, however, let me make it perfectly clear that the council joins with all Canadians, men and women, in welcoming the entry of Quebec into the Canadian family. We do not wish to have the misrepresentation labelled against our council that by criticizing the Meech Lake accord we are somehow against Quebec.

The first part of our brief that I would like to discuss is the section on equality rights, which is found in paragraphs 12 through 34. Our concern about the impact of the accord on charter rights arises mainly, but not exclusively, from section 16 of the accord.

Briefly put, we believe that section 16 will invite the courts and perhaps legislators to adopt a hierarchical approach to the Constitution in interpreting the rights within one part of one constitutional document, such as the charter, or between documents themselves, such as rights grounded in the Constitution Act, 1867, coupled with the eight sections of the Meech Lake accord which would fall back to the 1867 act, versus the Constitution Act, 1982, the charter, some sections of which have been post hoc included in the Meech Lake accord, leaving only section 16 to stand on its own as the 1987 document.

Our position, in brief, is based on the following reasons:

First is the principle of statutory interpretation that when certain things are specified in a law, for example, the protection in section 16 for only certain charter provisions, things that are not mentioned, for example, all the rest of the charter for all other groups covered and given equality rights under the charter, those things not mentioned will be excluded. When I go, as I have, across this country and throughout this province to speak on the Meech Lake accord, I try to define that as, "Mean what you say and say what you mean."

Second is the potential effect, which we believe, of course, was unforeseen by accord drafters--they may be visionary, in certain persons' eyes, but they certainly cannot be prescient--the potential effect unforeseen by the accord drafters of the June 25, 1987 decision by the Supreme Court of Canada in the Reference re an Act to amend the Education Act.

In that regard as well, I wish to simply state and stress the fact that we do believe that Madame Justice Bertha Wilson's decision, writing on behalf of the majority, as well as the comments of the separate decision of Mr. Justice Estey--because again, those were the decisions that supported the overall results that are of great difficulty and raise this concern.

Our arguments are set out in some great detail in our brief. In an effort to be constructive in our criticism, and again after extensive consultation which included Quebec women, anglophone and francophone, the council drafted an amendment to the accord which would resolve our concerns on the risk to the charter. That amendment is found on page 11, paragraph 32 of the brief and is set out in its specifics at the top of page 12.

The amendment, which we are satisfied is necessary to remove the risk to

equality rights of the charter, would constitute an amendment to the Meech Lake accord by adding immediately after section 1 of the accord the section set out on page 12, requiring that the Constitution of Canada be interpreted in a manner consistent with the charter. To be consistent, we would delete subsection 95b(3) of the Constitution Amendment Act, 1987 and section 16, by virtue of redundancy.

It is our position that it is that amendment and only that amendment which is necessary to guarantee that charter rights will remain in balance. Despite the statements in the report of the special joint committee, our recommendation does not and was never intended to create a paramountcy for gender equality rights. I believe it is the history of women in this country that we do not attempt to advance our rights at the expense of other disadvantaged groups. Our recommendation would simply make the charter equal to other constitutional documents.

#### 1150

In addition, women's claims for equality rights are rarely, if ever, achieved without opposition and the Supreme Court of Canada has not yet provided a statement of how it will interpret the equality rights of the charter. In the only gender equality right, the Justine Blainey case, leave to appeal was dismissed but no reasons were given. Women's organizations have laboured painstakingly through litigation and through research to ascertain a clear statement but none is yet available.

We are not willing to wait to see if the accord has repercussions on equality rights as many in support have urged us to do. They are simply too important. This is why the council also adopted a recommendation calling on the federal government to refer the question to the Supreme Court of Canada, and we ask this committee to recommend to the Ontario Legislature that the question be referred through this Legislature on to the Supreme Court of Canada through the Ontario courts before ratification. That process was adopted on certain issues in 1981 and is one we welcome, invite and request.

Briefly, as well, we have concerns about the issue of federal spending power, and I will now turn to our submissions in that regard. A substantial part of our brief, paragraphs 35 to 67, contains a review of section 7 of the accord which deals with national shared-cost programs. Many of our comments stem from a concern about the inherent ambiguity of virtually every phrase or clause of this section.

It may well be appropriate to couch constitutional documents in general language that will withstand the application and extension of principles in diverse and unforeseen circumstances. You will get no argument from me in that regard. However, section 7 does not constitute a general statement of principle. It is a specific rearrangement of the conditions under which the federal government will exercise its spending power. Virtually every operative word in this section is newly coined and/or ambiguous and it is this point that most troubles the council.

The very unpredictability of the section may prove to be an impediment or disincentive for federal leadership in the area of shared-cost programs and for clarity in the view of provincial legislatures in knowing what is and what is not deemed to be acceptable within the intention of section 7.

We are not suggesting that provinces do not and should not exercise initiative. However, Canadians want and, by virtue of section 36 of the



Constitution Act, 1982, are entitled to equal opportunities for wellbeing, the reduction of regional disparities and essential public services of reasonable quality. Women have looked and will continue to look to the federal government to exercise leadership in ensuring comparable access to and quality of services no matter where they live. For this reason the council has recommended that amendments be made to this part of the accord.

The last part of brief, paragraphs 68 to 72, speaks to the process of constitutional reform in Canada. Canada's Constitution is more than a simple legal document. It sets out the framework for decision-making and power in Canada through institutions such as the Supreme Court of Canada, the Senate, the House of Commons, the provinces and territories and now through a process of first ministers' conferences. But there is a reality gap with regard to our Constitution. Historically, women have not been and are not yet participants in that fundamental process, nor are women's experiences taken into account in our decision-making and power structures.

It is the council's firm conviction and recommendations that the federal government and all those charged, including provincial legislatures, with safeguarding the democratic process in Canada take every step to ensure that in the exercise of political responsibility and prerogative, the women of Canada are provided with a meaningful opportunity to contribute at all stages of the political and legal Constitution decision-making process.

In the drafting of a Constitution, as in all other tasks, there exists a linkage between the form and the function, between, as Mr. Harris noted this morning, the process and the product. The quality of this linkage and of the process inevitably is reflected in the product. We believe that, like the process, in this specific situation the product is unacceptably flawed. Our analysis and consultations across this province and across Canada on the Meech Lake accord lead us to the conclusion that there are risks and ambiguities which must be redressed.

We hope you will be persuaded to recommend these amendments when you have had an opportunity to fully read and digest our brief. However, what we ask first and foremost is that you rely on the arguments as we present them and respond to them on those terms. There is always the potential. We have been told, "Well, of course the assurances given now will be considered by the courts in the future." Unfortunately, part of that record is the report of the special joint committee, which is wrong and which is not a fair or accurate representation of women's concerns and their submissions.

We urge you in this committee to attempt, as far as you can, to set that record straight and to prepare us for those tasks in future. We ask you, therefore, to rely on the arguments as we present them and to respond to them on those terms. Although public hearings are not required to date as part of the existing process for constitutional amendments, we believe firmly that the public does have a place in the constitutional process. You, in this committee, have an important opportunity and responsibility to ensure that the public record is fair and accurate. We look forward to your report and we believe it is finally time for the Mothers of Confederation to be heard. Thank you for your attention.

Mr. Chairman: Thank you very much for your presentation and also for bringing to us the brief which was submitted last August to the joint committee. I think the point you have made about the way in which the various women's groups views were set out in the report has been mentioned on a number of occasions.



Ms. Pepino: Yes.

Mr. Chairman: I would say that we are mindful; I certainly hope we are. The danger of trying to interpret at times and getting it wrong has been made clear, so I think that as we go and prepare our report, we are going to make sure that, however it is, we are setting out the views that have been expressed. We want to make absolutely certain that we do not misinterpret what has been said.

Ms. Pepino: Thank you, Mr. Chairman. That is very important to the council. As I noted in my submissions to you, obviously the brief may appear dated, but I attempted to also incorporate present and existing concerns. That certainly is one of them.

Mr. Chairman: We will start the questioning with Mr. Harris.

Mr. Harris: The first question deals with something you did not talk about, which by its absence may tell me and this committee what you think of it. There has been more and more discussion in recent months of the possibility of companion resolutions when legislatures are having difficulty with aspects of the accord, with trying to live within the guidelines that have been set down by their premiers as to what they are to do with this accord and trying to live up to some commitment to those who have come before them. If they feel strongly enough, perhaps a companion resolution is the way to express that. Could you comment on that from your organization's point of view? Have you talked about it?

Ms. Pepino: I confess that by virtue of the fact we meet only quarterly, with executive meetings in between, the council has not taken a council position on it, but I believe that I am safe, without straying from council's position, in saying the following: I was aware of the fact that this committee has had floated out for discussion and comment the whole concept of companion resolutions. I simply ask the committee, when discussing them, to recall and trace it back to its root. As I understand from some of the research provided to me, it first came out to deal with the issue of aboriginal rights. Those individuals have nothing and a companion resolution, being perhaps less than half a loaf, is certainly more than they have.

With the greatest of respect, I think the different positions and the different problems make it very clear from that point of view that women's groups certainly have not adopted that. We believe our problem is quite different and therefore the solution is quite different.

1200

The other comment I have is simply to ask: What kind of companion resolution? What would be the linkage between that and the Meech Lake accord? It is the position of the Canadian Advisory Council on the Status of Women that as a result not only of consultation but also of research, the only way to handle the issue of threats to equality rights is an amendment. A companion resolution, in my understanding, would not be an amendment and from that point of view would be absolutely unacceptable in approaching the difficulties we have brought before you. It simply would not cut it.

Mr. Harris: As I understand the term, "companion" implies that as well. The difficulty, I suppose, with "companion" is that you are saying Meech Lake is approved and--

Ms. Pepino: That is right. That is the problem that is not

acceptable. There are three or four versions of the companion resolution I have heard. If, for example, it is intended in that scenario to leave the Meech Lake accord unchanged and to pass another resolution for submission to the first ministers' conference at some future time, that is a variation on the "trust me" theme. With respect, that is just unacceptable. Number one, we have been burned too many times in the past, and number two, the process being so sufficiently flawed, with women's voices not being at that table and many of those first ministers being the same, yet again we have no assurances that our concerns would be addressed.

If a companion resolution is intended to go forward and to say, "We have ratified Meech Lake but we have also passed the other and we are floating that out for present ratification; other ratifying bodies can pick and choose as they wish," that, again, is unacceptable. That does not go to the root of the problem, which is the accord itself.

If a companion resolution is, as we would hope, an actual amendment, that is, "Meech Lake should be ratified only if it incorporates the following amendment," then, of course, why do we not call it an amendment? That is what it is. It is a resolution to amend the Meech Lake accord in a way that the women of Canada and this province are requesting. In those circumstances, I think it would simply be labelling it in a way that might mislead the public as to what your recommendation would be. I do not know exactly what it is, but if it is those first two things I mentioned, those are not acceptable.

Mr. Harris: Second, on the process, involving women in the process--the companion resolution, by the way, as you say, does not do anything to involve women in the process or to guarantee women's equality in the process.

Ms. Pepino: Yes.

Mr. Harris: If we are going to get into process, and I am sure this committee is, we are going to have to deal with that as well, because one of the ways to amend the Constitution is for an amendment to be initiated by a Legislature or the Senate or the House of Commons and then circulated, and if the required number of provinces agree, that is it. That still does not address the whole process issue we want to deal with, and I am sure native peoples would have problems similar to those that women's organizations do in the process.

I would like to ask you specifically: If women's groups were to be involved other than through their elected representatives, which has not put too many women at the table historically so far, and the government of Canada or Ontario were to say, "We want to involve women at every stage," as you have suggested, who do we go to? Is it the Canadian Advisory Council on the Status of Women if we said, "Look, you are at the table and you are an equal partner in whatever this process is"? You have not got specific on how it is going to be done. You have just said you want to be involved. Is that the group?

Ms. Pepino: The Canadian Advisory Council on the Status of Women could certainly be one of the groups at the federal level. That in fact is our mandate and role already. We comment on existing legislation and on initiatives of the government, as well as suggesting new initiatives to it. You will note the detailed sections of our brief speaking very specifically to the appointment of Supreme Court of Canada justices. We have asked for a specific, formalized role in commenting on those nominations and bringing names forward, as I can advise you the federal government has invited us to do in the past.



With regard to federal judicial appointments, the council has been invited by the federal government to make nominations. That, under the terms of the Meech Lake accord, would be absolutely shut off, so an existing practice would be foreclosed to women. There could be a number of groups. I am not going to be particularly helpful to you in this regard because the council did not wish to suggest a specific or best method of ensuring the kind of procedural guarantees we had looked at.

Rather, what we hoped to do was to establish a number of principles that could be applicable in each individual province, representing and recognizing their differences. I am aware, for example, that this province has traditionally had an advisory group, so-called, on intergovernmental affairs. This province may choose to include a formalized representation from provincial women within it. You may choose to call on ongoing appointments. You may choose to bring to the table the Ontario Advisory Council on Women's Issues. It could be in any one of a number of ways.

Mr. Harris: Can I?

Ms. Pepino: Certainly.

Mr. Harris: The difficulty I have is that perhaps it has not been so important because none of the women's groups have had any power, so there is no big deal attached to it.

Ms. Pepino: That is right.

Mr. Harris: I do not say that facetiously.

Ms. Pepino: No, I recognize our concerns have been disposable.

Mr. Harris: Now we are saying women have to be involved and we must give them some power.

Ms. Pepino: Yes.

Mr. Harris: I agree with you. I know that as native groups have been involved--or at least I am told--when they actually were to be given some say--it has sort of been taken away now, it appears--then the great difficulty was, who is going to speak for the native peoples?

Ms. Pepino: that is right.

Mr. Harris: You are asking for some power. Are we going to get into difficulties? A difficulty I have with you and your group, and with the Ontario advisory council, is that you are appointed by order in council, which in essence is the Prime Minister.

Ms. Pepino: Yes.

Mr. Harris: In Ontario, it is the Premier. If those two guys can exercise the same control that they can over their members, what is the point of having you involved?

Ms. Pepino: I understand that and it is for that reason as well that we did not wish to identify a specific process. I think it is clear from the example of both the federal advisory council and the provincial advisory council--



Mr. Harris: I have not seen them ever be able to have that control, but I--

Ms. Pepino: Thank you very much.

Mr. Harris: I did not want to--

Ms. Pepino: It was the Canadian advisory council order-in-council appointees in the main who broke ranks and broke silence and refused to be silenced in 1981 and 1982. I made the point that all of the existing members of the Canadian advisory council are order-in-council appointees of the present federal government, and yet you have our brief.

Mr. Harris: Yes.

Ms. Pepino: Having said that, I think of paramount importance is that there be an opportunity for women's groups, including the two advisory councils, to have input. If in this province, for example, it is by way of ensuring that there is consultation, perhaps through hearings like this, on an agenda that this particular province intends to bring forward for constitutional renewal, then that might be an appropriate way. I do believe that we cannot substitute particular advisory groups or advice for the democratic process. We are only asking that the democratic process be exercised in a democratic and open fashion. I cannot be of any further help to you in that regard.

Mr. Harris: I am going to pass on to the others to take their turn.

1210

Mr. Allen: First, I want to express my appreciation of the comprehensiveness of the brief and the detail in it. I think it is extremely well done and I want to compliment you on that

The first question I want to ask really follows up from the good questions that Mr. Harris just put to you. I guess one would say, or would you say, that if women were adequately represented in the legislatures and Parliament of the nation and therefore, on the various committees and decision-making bodies related thereto, there would be no need for the kind of special input that you are now suggesting.

Is that the case or not? Or is there some other purpose to be found in your proposal?

Ms. Pepino: Through you, Mr. Chairman, to the questioner, Mr. Allen, we would only wish. I frankly have some--I am an optimist and I believe that we are working to that goal, but at present rates, I believe it is somewhere into the year 2080 when we would come close to achieving that kind of representation.

The second point I would make is that, within our democratic system of party politics--and the evidence frankly, is brought to you again and adverted to by Mary Eberts in her brief, and I sat in rooms and I sat in that special joint committee hearing room in Ottawa last summer and I saw it--women who are part of partisan politics, and those circumstances where the numbers are small, before we get to what I have termed "critical mass" where they are free to be women first and party members second--we are not at that point and I think it would be quite some time before we are at that point, if ever--can

effectively be silenced through party loyalty, through the kinds of things that are appropriate in party politics and in a governmental system that includes a government and opposition.

Cabinet solidarity is important. Party loyalty is important. That has the effect, in so many of these circumstances, of silencing women who are at the table. That, in my judgement, happened in 1981. That has happened, with only two exceptions, with regard to the discussion on the Meech Lake accord.

So, in my submission, it is not sufficient. The other point perhaps I could make here, although it is in part in response to Mr. Harris's question, even then I do not believe it is sufficient to leave the process untouched, because the process includes unseemly haste to a decision, unseemly haste to ratification, and if we are lucky, we can pry out some consultation that has been predestined in this result.

It is that process alone that I think so many Canadians and so many people who have come to this committee have found offensive and frankly, a charade. It is that, as well, which must be changed, in our submission. As part of those changes, it would give all women and all equality seekers, and all those interested in constitutional renewal, an opportunity to come to the table.

I think the pace of constitutional change must be slowed down. This is not simply a piece of legislation.

Mr. Allen: I think I certainly agree with the latter point and most of our committee members have expressed a lot of concern and that is on the record, around that whole matter, the process and speed and haste.

I do not have any problem with structures which allow as much access as we possibly need in these circumstances, to get it right. I certainly have no problem with, if you like, affirmative action measures which make certain that women's organizations and their spokespersons are there and heard in the councils, committees, etc.

What I am not quite sure whether I hear you asking, what I think one or two groups have suggested, and that is that some amendment to the Constitution be made to put in place actually, for example, women's formal representation through national bodies, on structures that would be part of a decision-making or recommending process with regard to the appointment of Supreme Court judges, for example.

In other words, are you asking or suggesting through your remarks some constitutionalizing of that presence as distinct from major participation in the lead-up processes?

If I can just say that the background of my concern is of course, the kind of response that one anticipates getting, that women become formally written into the Constitution in a way that men as men are not, notwithstanding the power that men have in the system on a de facto basis, if you see my distinction. I am just wondering where you go on that.

Ms. Pepino: The council has not specifically come up with a recommendation as to whether women's voices should be constitutionalized or merely institutionalized. I believe I would be safe in saying, however, that if there was a constitutional guarantee, that would be ideal. That is what we are asking for, for charter rights and for equality rights. We have made it



clear, however, that we would like formalized, certainly with regard to Senate reform, whatever the eventual system may shake down to be, and certainly with regard to Supreme Court of Canada judges' decisions that there be a formalized structure put in place to incorporate the ability of women to have that input. Under the Meech Lake accord, we have found ourselves losing a right of input, because that right has not been enshrined in any legislation or Constitution.

I hesitate to say specifically that it must be constitutionalized. I do believe that there may be other ways of accomplishing it, but if it can be done carefully, carefully drafted with input as to the language, if it was done at a pace that permitted everyone to have looked nine ways to the centre to ensure that there would be no impact on any of the other constitutional goals and purposes, then yes, I think that would certainly be acceptable.

I am not being helpful with you because I cannot say the council has said this is preferable to that, but our goal is to ensure that they are enshrined in some fashion. If that can be done through a constitutional amendment without damage being done to the remainder of the document, I certainly think that would be the best.

Mr. Allen: Let me say I appreciate your answer the more for not being tight and quick.

Could I ask you, why is it necessary to restate section 36 vis-à-vis the application terms of reference of spending power that is already in the Constitution?

Ms. Pepino: To restate it?

Mr. Allen: Under your spending power comments, you said that among the items that you would want changed in section 7 was that section 36 of the 1982 document, the Constitution Act of 1982, which spells out the equalization and regional disparity principles, should be written into section 7 concerning the spending power. What I am asking you is, why is that necessary since it is already a fundamental and clear part of the statement of principle that kind of equalization shall take place in the Constitution Act of 1982?

Ms. Pepino: Part of that had to do, as I understand it--and here is where I have to restate that I am not a constitutional expert. My understanding of that specific recommendation by the legal experts with whom we consulted had to do with the issue that the charter does not necessarily flow back into the 1867 act, whereas section 7 was one of those which was intended to get set up in a hierarchy of rights. As I understand it, the belief was that it would be a clear intention to ensure that, first of all, that there be equality for all groups and, second, to deal with this entire issue of setting a national standard, if I could call it that, where there would not be the opportunity to the same degree as we believe the existing wording would permit for significant regional disparity.

1220

Mr. Offer: Thank you very much for your presentation. I especially appreciate the comments with respect to Mr. Harris's question on the companion resolution. I think that is extremely important, indeed, in terms as to how you characterized it. I glean from your response that you are taking a look at what the purpose is, the object, for this companion resolution.

Ms. Pepino: What would it accomplish and when.



Mr. Offer: Right. If it is to be an amendment, well, just call it that and nothing else.

Ms. Pepino: Yes.

Mr. Offer: I would like to carry on in another aspect in a similar field, something you just touched on in your presentation, and that is the whole question surrounding court reference. I have taken a look and I have not seen anything in the presentation by the advisory council on the whole question of court reference, but you will be aware that many groups have come before us saying there should be a court reference. Again, there are questions as to what the object is, what it will accomplish, how it is to be phrased, very much like your response on the companion resolution.

I wonder if you can share with us your thoughts with respect to the practicality, almost, of a court reference, keeping in mind its purpose, intention, what it will accomplish and how and will it accomplish it in any case.

Ms. Pepino: Its purpose would be to prove who is right in this debate. I would love to be proven wrong because if I am proven wrong, the women of Canada and their submissions that there is concern are proven wrong and they say: "There is no concern. Charter rights are not affected," then we have a Supreme Court of Canada precedent stating that. It is one of the few times in my life that I would love to be proven wrong.

If we are proven right and the courts say, "Yes, charter rights are affected detrimentally," there we are. All of those fears, concerns, what we believe are reasonable apprehensions will be proven right. You will note that one of the conditions I said, of course, was before ratification, so that we are not having to unwind something and go back and fix something that could easily be fixed right now by simply not completing it for a while until we find out if it is right.

I noted with interest the knitting example that was given to you, and the unravelling. It was perfect.

That was the purpose. Are we right or are we wrong? If we are right, that is a more difficult answer because that means we then have to continue on with our submissions and our lobbies and our write-in campaigns and all of those things the women's movement has done in the past with some success. It will be exhausting, but it will be done, because then we will have judicial right behind us.

If we are wrong, that too is delightful because then we have a precedent against which no further judicial interpretation could be made to jeopardize women's rights.

As to how it is done at the federal level--and the council passed a resolution in September 1987 very clearly stating there would be certain conditions on it. The first, of course, would be that the reference should be made prior to ratification because of the difficulties in unravelling something that is half done in some of the provinces.

The second is that there be full consultation, as I understand there was in 1981-82 with women's groups and concerned equality seekers.

As to the language, it is easy enough to push off a question and to get

an answer, but if the answer turns out to be bad for the referring legislature, if it turns out to be bad for the referrer, they can say, "Well, that is not the question that we needed to ask in any event." We would want to have input on the question and we would want to be guaranteed that there be some standing.

I recognize the difficulty if you have 147 people lined up requesting the ability for standing, but I can assure this committee that there has been sufficient consultation across this country and through this province of the various women's groups, the Ad Hoc Committee of Women on the Constitution, the Women's Legal Education and Action Fund, the councils on the status of women, both federal and provincial, and two or three others, the Business and Professional Women's Associations, the National Association of Women and the Law. I believe there could be easily put together a group of four, five or six women's groups only, which would be justified and required in our scenario to be given standing to avoid that potentiality.

It is not without administrative difficulties and it is not, I suppose, without its own inherent risks, but frankly, sitting here, I would rather run those risks than the risks of having the charter affected as we believe it will be by having Meech Lake ratified in its present form untested and unamended. Our first goal, of course, is amendment. Failing that, we believe that it should not be put into final form until it has been tested.

Mr. Offer: If I might, just for a moment, carry on with that, to my mind, if there were to be a court reference, the object for which you would have that is, as you say, who is right and who is wrong, but it would be for some clarity, for some certainty as to how one matter affects another. I just cannot leave it at that. Most deputations leave it at that. I want to take that next step: Would those purposes or could those purposes be accomplished?

When we take a look at some of the past court references, there was a focus, there was a specificity, a "raison" for the reference. There was in the ??Anti-Inflation Board case, and certainly in the commission of rent review type of case or at the egg marketing board. Even in 1981 and 1982 there was a more specific focus as opposed to saying to a court, "Tell us generally how this affects that." I am not certain that a court would even entertain that, personally, number one; and number two, even if you tried to bring a focus using a fact situation--

Ms. Pepino: You might leave out the flexibility, yes.

Mr. Offer: How many variables are there in court situations? What reliance is there? That is something I have had a terrible time grappling with, and I am wondering if you can share with me, in dealing again with the purpose for which a court reference would be instituted, and keeping in mind the very clear realities of what would be required, whether that purpose is ever achievable or whether we have to do it as we are doing it with respect to the Charter of Rights: case by case, fact situation by fact situation?

Ms. Pepino: It is because of the technical problems that Mr. Offer raises that the women of Canada have said our foremost goal is to amend the document. It is that simple. I speak to a reference only reluctantly and as very much a second- or third-best solution, as a fallback solution. I hear what you are saying. It is discussion that we certainly have had around the table and on which we have sought guidance, and we are aware of that.



But the problem is that until we have sat down, as I understand happened, although I was not at that table in 1981 and 1982, and actually attempted to draft the questions, we cannot guarantee that it cannot be done. So because we have not been given that opportunity to say it cannot be done, we believe that with goodwill and good minds, both of which we are willing to offer, there is some potential. But it is in recognition of those pitfalls that we have said that, in our judgement, the only way Meech Lake can be dealt with appropriately is by amending it.

Mr. Offer: Thank you very much.

Mr. Chairman: Just in closing, could I ask you one question? You mentioned at the beginning in your comments in terms of your council that the brief that was presented represented the views of the members of council, and that meant both francophones and anglophones.

Ms. Pepino: Yes.

Mr. Chairman: One of the dilemmas as a legislative committee for a specific province--in this case, Ontario--and we are being asked to deal with something which, whatever other importance it has, certainly is very important to people in Quebec and to French-speaking Canadians. There have been, not before our committee but in other forums, different viewpoints expressed by, in the one case, the Fédération des femmes du Québec.

1230

I am not saying that just because they may have expressed a different viewpoint, therefore they are correct. The point of my question is, have you sensed in your own discussions with francophone women, whether your colleagues on the council or perhaps through other contacts, fundamental differences in approach? Are these nuances? Is there a concern there about what this might do to the charter? I think one point that has been raised with us is a certain feeling that everybody should come together, that this has been negotiated and the Premier of Quebec feels that this is right and, therefore, within Quebec, should be done. Are there nuances? Are there some things there that you stopped and thought about, or in the council did everybody come together and really say, "No, look, there are some fundamental problems here that we have to address?"

Ms. Pepino: A couple of comments in that regard. First of all, with regard to the Fédération des femmes du Québec position, I just stress that they have not said that the Meech Lake accord should not be amended. They have supported an amendment. They have very clearly stated for the record that they would accept an amendment to section 28 to ensure that their English-speaking sisters beyond Quebec and within Quebec are not put at risk.

First, I think it is part of the misrepresentation, the big lie, to say that francophone women resist an amendment to the Meech Lake accord. Certainly the FFQ does not.

Second, turning specifically to the council, you may have read some history on the council. We are at any given time in our history--and I have done some reading about the history--anything but a homogeneous or particularly bland group. Yes, of course, there was discussion; there were heated discussions. We were copying the people who were drafting the Meech Lake accord: We had all-night sessions. But I can say to you in full confidence that the brief that is before you today and the submissions I have



made are supported by every member of council. The concerns that were raised by the francophone women from Quebec were those that were not the legal argument but the political argument, the big lie: If we touch this fragile document, if we touch this fragile agreement, it will unravel. Yet somehow this fragile agreement has become a big stick with which the women of Canada are being laid about the head and shoulders.

When it was very clear that it was the council's goal to achieve protection for equality-seeking groups throughout Canada without unravelling the political deal and that there were ways we believed it could be done, we are saying, I suppose, that we will, to this extent, take the first ministers at their word. They said: "We did not intend to affect charter rights. Trust us." Our answer to them, I suppose, is, "If you trust one another and if your goal is equality rights and not affecting the charter in any detrimental fashion, then presumably, gentlemen, you could go back to the table and make that agreement without reopening the Meech Lake accord." To that extent, I suppose we are willing to take them at their word and to indicate that they are deserving of our trust.

I simply do not accept the fact that if the political will were there and if the fathers of the new Confederation meant what they say when they say to us, "We did not intend to affect the charter of rights," they could get together yet again and not reopen any other aspect of the deal. That is what we are asking them to do. It is because of that, because the political reality of having Quebec finally in the Confederation is so important to all Canadians, because our group is a federal group and we believe strongly in federalism, in the recognition of Quebec as a distinct society and in the recognition of duality throughout this country, that we say you do not have to unravel the deal or have this fragile thing fall apart simply to give us surety with what we believed was your guarantee all along or what you say was your guarantee all along. So, from that point of view, I am sorry it is a long answer, but I can say to you that the resolutions and the brief I have brought before you today are the council position.

Mr. Chairman: Thank you very much. I appreciate your making that even more clear. That is the way I read you at the beginning, but it is something which comes up from time to time. I was not intending to suggest that the Fédération had said, "Look, we think Meech Lake is perfect," but I think it is important for us when, as in your case, you are a member of a federal organization that does have both francophone and anglophone members, that we recognize what this brief is and what has been stated there.

Ms. Pepino: Thank you, Mr. Chairman. I thank you too for your recognition that the Fédération had not taken the position that it wanted to see the Meech Lake accord left untouched. That, unfortunately, has not been necessarily part of the public record. Indeed, what instead we have been attempting to overcome is the absolute misrepresentation that women in Quebec are unwilling to consider any change.

Mr. Chairman: Thank you very much for coming in this morning and, I guess, into the early afternoon. We very much appreciate your statement, the document you have left with us and your answers to our questions.

Ms. Pepino: Thank you, Mr. Chairman, and members of the committee.

The committee recessed at 12:36 p.m.

CANDON

XC2

-87C52

C-24b

(Printed as C-24)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 13, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

McGuinty, Dalton J. (Ottawa South L) for Mr. Elliot

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the United Church of Canada:

LeBlanc, Philippe, Human Rights and International Affairs

Individual Presentations:

Strecker, John

MacGregor, Kirk

From the Registered Nurses' Association of Ontario:

Ross, Eleanor, President

Donner, Dr. Gail, Executive Director

Dick, Diana, Project Manager



LEGISLATIVE ASSEMBLY OF ONTARIO  
SELECT COMMITTEE ON CONSTITUTIONAL REFORM


Wednesday, April 13, 1988

The committee met at 3:40 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good afternoon. I would like to call our first witness, Philippe LeBlanc, if he would be good enough to come forward, representing the...

1540 follows



(Mr. Chairman)

~~I would like to call our first witness, Philippe LeBlanc, if he would be good enough to come forward, representing the United Church of Canada. It is a pleasure to have you here, and I should state for the record that Mr. LeBlanc and I worked together a number of years ago, and he has been very involved in issues related to human rights, multiculturalism, citizenship and is a fountain of sage advice in all those areas. We are very glad to have you here this afternoon and why do I not just let you proceed with your presentation and we will follow up with questions?~~

1540

Mr. LeBlanc: Thank you very much, Mr. Chairman.

UNITED CHURCH OF CANADA

Mr. LeBlanc: The United Church of Canada welcomes this opportunity to bring its perspective to the debate on the Meech Lake accord, and on the basis of its tradition of participating in shaping communities and in working toward a just and inclusive society, the church would like to offer its comments to ensure that the constitutional process will lead to a better society for all.

I have three items that I would like to raise with you. I understand that copies of my brief have been circulated to the members of this committee. The first item I would like to deal with is Quebec's acceptance of the Canadian Constitution.

The United Church of Canada welcomes Quebec's inclusion in the circle of Confederation. The Meech Lake accord is intended to bring that province into full and active participation in the Canadian Constitution that was adopted in 1982, without Quebec's consent.

Article 2 of the Meech Lake accord recognizes the duality of our country and that the existence of both French-speaking Canadians and English-speaking Canadians constitutes a fundamental characteristic of Canada.

The accord also recognizes that Quebec constitutes within Canada a distinct society. The United Church of Canada rejoices over this recognition. However, we do realize that the "distinct society" clause has raised some concerns among groups such as aboriginal peoples, woman and francophones outside of Quebec. There is a concern, for example, among francophones outside Quebec that the language in article 2(b)(2) should say that the role of the Parliament of Canada and provincial legislatures is not only to preserve but also to promote the fundamental characteristic of Canada referred to in paragraph 1(a) of the accord.

It is important that Quebec be a full participant in the life of Canada at all levels. We can only celebrate Quebec's accession to full partnership in the Canadian Constitution.

The second item I would like to deal with is the call of aboriginal peoples for more participation in this process.

The United Church of Canada supports the call of aboriginal peoples for

Mr. LeBlanc

C-1540-2

3

April 13, 1988


justice and fair treatment in the constitutional process. The church appeared before the federal special joint committee on the Constitution of Canada in 1980 and declared that section 24 and other sections—we were talking of the draft document at the time—of the proposed Constitution should set forth in detail guarantees with respect to the aboriginal and treaty rights of native peoples and representatives of aboriginal nations should be full members of all future constitutional talks.

In his own presentation to the special joint committee on the 1987 constitutional accord, George Erasmus, speaking on behalf of the Assembly of First Nations said:

"I must remind you that the Assembly of First Nations is on record as stating its support for Quebec's aspirations to be a functioning partner in Confederation. However, two points must be made with regard to our support: First, the circle of Confederation is not complete with the entry or re-entry of Quebec alone into the Canadian family. The circle will only be complete when the rights of the aboriginal peoples of Canada are unequivocally expressed and protected in the Constitution and when the relationship between the first nations and the rest of Canada is respected. Secondly, it is our strongly held position that any arrangements or agreements struck by the federal and provincial governments must not implicitly or intentionally diminish or prejudice the rights or status of the first nations of Canada, and I cannot stress that enough."

The United Church of Canada supports the call of aboriginal peoples for renewed constitutional meetings to ensure...

1545 follows





(Mr. LeBlanc)

~~The United Church of Canada supports the call of aboriginal peoples for renewed constitutional meetings to ensure that all the founding nations, including the first ones, the aboriginal peoples, are fully part of the Constitution.~~

The United Church of Canada deeply regrets that the first founding peoples are not yet included. We urge the premiers and the Prime Minister to delay the process of ratifying the accord until such time as the aboriginal nations have come into the circle of Confederation. It is unconscionable that the second and third founding nations should come to a constitutional agreement that includes only themselves, while the first nations are left out of the circle. The United Church of Canada is committed to stand in solidarity with aboriginal people until their rights are fully enshrined in the Canadian Constitution.

We are suggesting some amendments to the Meech Lake accord, and I will deal here with two key issues. First, the Meech Lake accord needs to be amended to include people, especially women and the disabled, who are not explicitly assured that the rights guaranteed them in the Canadian Charter of Rights and Freedoms will not be overridden by Meech Lake.

A number of women's groups have expressed concern that the "distinct society" clause in reference to Quebec may allow that province to override such guarantees in the charter as equality before the law on the basis of sex, found in article 15. They are also concerned over the implication of the inclusion in the accord, at the last minute, of clause 16, which affirms that the charter articles related to native and multicultural groups, articles 25 and 27 of the charter, are not subject to the "distinct society" clause.

Does this mean that the "distinct society" clause of the Meech Lake accord would supersede the Charter of Rights and Freedoms in dealing with women's rights under articles 15 and 28? Why were only native and multicultural groups singled out in the accord as an afterthought? On the basis of these concerns, we recommend that section 16 of the Meech Lake accord be strengthened and amended to ensure that none of the rights of the charter are affected.

Secondly, we further recommend that section 106A(1) of the accord be amended. This section states that the government of Canada should give reasonable compensation to a province that chooses not to participate in a national cost-shared program "if the province carries on a program or initiative that is compatible with the national objectives." Apparently the original draft of the clause included the words "national standards" rather than "national objectives." Our concern is twofold: one, of equal justice for all peoples across the country, and two, that individuals in some parts of Canada might not be provided with the same level of social services as those in other provinces. For example, a provincial government could receive federal moneys aimed at eliminating poverty, which it would spend on job creation through the private sector rather than on direct services to the poor.

We recommend, therefore, that the word "objectives" in the accord should be replaced with the original word "standards." This replacement would still allow provinces flexibility in developing their own programs but would ensure that provincial programs meet national standards and that federal grants are

spent equitably and in a consistent manner.

I thank you, Mr. Chairman, and members of the committee, for your attention. If there are any questions, I would be pleased to respond to them.

Mr. Chairman: Thank you very much for the submission. Can I just ask you, in terms of the United Church of Canada, is this a presentation of the Ontario United Church or is this the full body, just to be clear on its origin?

Mr. LeBlanc: Part of the answer is in the second paragraph, which I skipped actually, which states that the general council of the United Church of Canada has assessed a number of issues and developments in society and has addressed a number of issues, for example, French-English relations, minorities, disabled women, and this would represent general council policy, policies that have been adopted, so flowing from those policies.

1550 follows



~~address a number of issues. For example, French-English relations, minorities, disabled women, which would represent general council policies that have been adopted. So flowing from those policies~~

1550

Mr. Chairman: Yes. Thank you. I will turn now to questions. Mr. Allen.

Mr. Allen: Thank you very much, Mr. Chairman. Like yourself, I am very pleased. Although I have not worked with Mr. Le Blanc, I had some very close association with various of the national church officers on social issues, programs and problems. I am delighted that the United Church of Canada is here giving us its help with this difficult problem we have in this committee with the Meech Lake accord.

Perhaps just a fairly straight and direct question to you. I do gather that your statement is that the Meech Lake accord should not be ratified until we have completed the aboriginal round and the whole question of aboriginal self-government is settled in Canada.

Mr. LeBlanc: That certainly is the gist of our recommendation, that they have not been part of this, that the constitutional talks with natives should be reopened and that the Meech Lake agreement should be delayed until this can take place.

Mr. Allen: Does that mean that you have no confidence that round will be reopened and that what in fact has happened here was simply a move towards another phase of constitutional reform directed at the problem of Quebec in the federation and that you doubt very much, however, that the country will come back shortly after the completion of that discussion and the first agenda items to the question of aboriginal rights?

Mr. LeBlanc: I think it is more a question that we, as second and third nations, are hammering out an agreement among ourselves, and yet we have not been able to hammer out an agreement with the first nations. The native groups, the aboriginal groups, feel very strongly that the solution should be sought for their issues and then we can resolve the issue of the second and third nations really. So the suggestion that we are making is that we try to resolve the first one; bring them into the picture.

Mr. Allen: I understand the moral urgency and I do not think there is probably any member of this committee who would not at that point agree with you. I guess the consequential question is, are you prepared to accept the political heat that comes without solving other problems that might be more easily resolved of how we get on with a longer-term agenda which obviously is yours, the one that you propose?

Mr. LeBlanc: I am not certain that we will be getting the political heat.

Mr. Allen: Do you foresee? The United Church presumably has to exist in all parts of Canada.

Mr. LeBlanc: Yes.




Mr. Allen: You exist in Quebec. You must have some concern about possible consequences in Quebec of the Meech Lake accord not being ratified or potentially the problem of the place of Quebec in Confederation in the wake of the 1982 settlement not being resolved and going unresolved for I do not know how long it is going to take. If we have Mr. Vander Zalm, Mr. Getty and Mr. Devine in place in western Canada for the next decade, then we obviously will not be able to solve the aboriginal question for the next decade. Therefore, we will not be able to solve this question for the next decade.

What I am trying to get from you is a sense of what kind of tradeoffs you are prepared to make down the road in order to maintain the moral protest. I fundametally agree with you, but there are a lot of things that we address politically that are easier to solve than others. We run a lot of little bills through this place that are not very difficult to pass, and then we have a few that take us a lot longer to deal with and which are of more moral consequence than the little ones. But sometimes we have to get the little ones out of the way just because there are a lot of little nagging problems out there that have to be solved and we just do that. But it does take away from our addressing the bigger issues. There is no question about that.

Mr. LeBlanc: I think in the brief it is stated very clearly that, number one, we certainly welcome Quebec's inclusion in the full circle of confederation. That is the first statement that I made. On ethical, moral and social justice grounds, we feel very strongly about the second one; how one reconciles that in the political...

C-1555 follows.



8  
(Mr. LeBlanc)

C-1555-1

8

April 13, 1988

~~... full circle of confederation. That is the first statement that I made. On~~  
~~ethnical, moral and social justice grounds, we feel very strongly about the~~  
~~second one. Now one reconciles that in the political arena is another issue. I~~  
certainly understand the questions that you are raising, but we feel that  
those two issues are both of paramount importance and we are in solidarity  
with the aboriginal peoples on that question.

They feel that in the four meetings they had, and especially the last  
one where they were claiming to be also a distinct society--and I have quoted  
some of ??George Erasmus' statements at the end--the premiers and the Prime  
Minister could not accept the idea of an undefined self-government or distinct  
society for native peoples. ??"But on this one we seem to be going ahead." I  
am quoting from their presentation.

We probably have the luxury or the liberty or whatever of putting  
forward both, which is celebrating Quebec's inclusion in the confederation but  
also reminding society and ourselves of the second one, the fact that the  
first nations are not part of this.

Mr. Allen: Can I just briefly ask you about the spending power  
subsection, 106A(1)? My sense is that the word "standards" could be used in as  
limited a way as the people who object to "objectives" think "objectives"  
could be used. The word "standards" could, for example, quite simply apply to  
a national program that requires the administration be done in certain ways,  
meeting certain elements of fiscal and economical standards, manner of  
admsinitration, style of delivery and perhaps never get around to really  
substantial content. What I would like to know is what is it that has  
persuaded you that "standards" has more content than "objective?"

Mr. LeBlanc: The example that is usually given is the one of day  
care. If it is national objectives, and they could be stated in fairly vague  
terms, then federal funds could be used for a variety of services; whereas if  
there were national standards that are set, for example for day care, that  
must be met by provincial programs, then we would not have uniform day care  
across the country, but we would have a set of national standards; which  
programs should not fall.

So that is where I would see the distinction between as I understand  
"standards" and as I understand "objectives." The objective could be to  
provide service to children in Canada; whereas a standard could be day care  
facilities and services must meet certain standards. Similar to the Canada  
assistance plan, there are national standards. With medicare there are  
national standards. That means if you live in Newfoundland or in British  
Columbia or in Ontario, there are standards that must be met. That is my view  
of the distinction, and I think it is a very important one.

Mr. Allen: It is an important distinction.

Mr. LeBlanc: Yes.

Mr. Allen: All right. I would suggest that perhaps you contact The  
Canadian Council on Social Development and ask it for a copy of the paper that  
it delivered to us in which it articulated a view of "objectives" which was  
that the objective of a child care program in Canada would be a national  
program, universally accessible, nonprofit in orientation, incorporating the

Mr. Allen

C-1555-2

9

April 13, 1988

international agreements that Canada is bound to in international treaty and other legal commitments that Canada has with respect to children and their status in the community. I would not want to close my door too quickly on this issue, but I refer you to that because I think you will find that document very interesting.

Mr. LeBlanc: Thank you. I do have the Hansard so I will look it up.

Mr. Chairman: I think we were in Ottawa the week of the 21st, but we found their description. They had four categories of some length in describing objectives which, as Mr. Allen said, put another perspective on the issue.

Mr. Offer: Thank you very much for your presentation. My questions are carrying on very directly with those of Dr. Allen. In the beginning of your presentation you bring home very strongly the...

C-1600 follows.





(Mr. Offer)

~~...those of Dr. Allen. And in the beginning of your presentation, you bring~~  
~~the very strongly the~~ necessity if Quebec's inclusion in the circle of  
Confederation. And then the presentation goes on to talk about the  
requirements of justice and fair treaty to the aboriginal peoples. And we have  
heard presentation and very, very strong arguments.

1600

The presentation then seems to say that you cannot have or ought not to  
have or should not have one without the other. That if there is not going to  
be any meeting of the aboriginal concerns, then the Meech Lake accord ought  
not to be ratified and as such, the necessary impact might very well be that  
that circle of Confederation would not be completed.

My question is that could it not--I would like to get your thoughts on  
this--be argued that to complete the circle of confederation with Quebec would  
be a very important and very necessary first step in meeting the need for  
justice and fair treatment to the aboriginal peoples. And if Quebec were not  
part of that circle of Confederation, really, what chance is there that the  
country as a whole through amendment to constitution would meet the question  
of justice and fair treatment to the aboriginal people?

Mr. LeBlanc: I think there is a feeling--and this is represented in  
our paper--that once the Meech Lake accord is ratified that we will have  
accomplished, we would feel in our country that now we have solved one  
problem, so let us--brownie points for us. And before we reopen the  
discussions to include the first peoples, it may be a very long time down the  
road. The reason for suggesting, the recommending a delay is that we are in  
the process of looking at how we organize ourselves as a confederation, as a  
country, and why not try to deal with the two outstanding issues at this point  
in time. Because there are no plans, as far as I know, in the near future of  
reopening the Constitution to bring the first nations into the picture. This  
is the opportune moment to do it.

Mr. Offer: I understand what you are saying. My question to you  
would be that the mere fact that we do complete that circle of Confederation  
with Quebec inside and that committees such as this and committees across this  
country are looking into this very question with respect to constitutional  
reform and constitutional process, that, in fact, by--I guess I ask for your  
comments--ratifying this agreement which calls for annual constitutional  
conferences which has precipitated committees across this country which are  
dealing with the vexing problem of process, that we may be opening the door as  
never before to finally meet the whole question of the aboriginal concerns.

I was just wondering if by projecting, we are really closing the door in  
a very, very--

Mr. LeBlanc: Our recommendation is not to reject; is to merely  
delay. And so we support number one; the inclusion of Quebec. And secondly,  
our recommendation is to delay so that this process could take place also at  
this same point in time.

Mr. Offer: Thank you. I do not know--I know we have some time, but  
carrying on with the question of the spending provisions. Thank you, Mr.

Mr. O'Flynn

C-1600-2

11

April 13, 1988

Chairman.

In your presentation, you talk about your concerns of equal justice for all across the country and (2), that individuals in some parts of Canada may not be provided with the same level of social services as those in other provinces. That is on page six. We have heard through questions from members and through presentations that services are not equal across this...

C-1605 follows



(Mr. Offer)

~~we have heard through questions from members and through presentations that~~  
~~services are not equal across the~~ land, that there is a wide variance in the type of services and they are very much reflective of the area, the province where these services are provided. My question to you is, the particular section 106, the spending provision, do you not see this as giving the provinces a flexibility to meet and to grapple with the very unique characteristics of their province? As such, it would be the working up section, 106, might very well be as its impact a very proper application of particular services in the area, it gives a flexibility which was not there before?

Mr. LeBlanc: Yes, and I agree with you. Actually, the conclusion of the paragraph is that even if the words were changed, that hopefully the province would not lose that flexibility, the concern. And Mr. Allen was mentioning that the Canadian Council on Social Development has come up with a different definition of objectives. But if one uses the English language, I think "standard" and "objectives" have very different implications. And we consider that the word "standards" would indicate that, at least, there are certain standards beyond which national programs could not fall below, whether it is day care or other programs. Hopefully, the flexibility would be there in terms of numbers, in terms of quality ??overall, but that the standards would be the same if they are using federal money. I think it is a semantic discussion, and I am sure that this could go on. But we feel strongly that objectives can be very vague and very general, whereas a standard is something that one can relate to.

Mr. Offer: Yes. I guess my thought has always been that with respect to whatever word is going to be used, because we are now: (1) entrenching in the Constitution the right of the federal government to enter into cost share programs, an area of exclusive jurisdiction on one hand; and (2) the right of the province to opt out with compensation as long as they carry on. That when all is said and done, it is going to allow--to my mind--the different interest groups, when there are these national cost share programs, to come to the provincial government, not only the federal government, but also to the provincial government and say, "Listen, this is the national program. We think that it is good and we think that you should implement it", or secondly, "We think you should opt out because these are the very particular characteristics of this province and you now have the option with dollars, with compensation, to do so". I am wondering if you can comment on whether to your mind it would give to those particular social groups, social agencies a new place, specifically the province, to carry forward their very particular and very genuine worthwhile concerns?

Mr. LeBlanc: If we are talking of the Constitution of this country, we know that down the line there could be some groups, as you suggest, who would take the governments to court, for example. And the debate would be around whether the provinces meeting the objective of the standard.

We are talking of a constitutional document here. Language then becomes very important because down the road, then it is interpreted in the courts. We know since 1982 the decisions that have been made in the courts really usually revolve around one or two words. So, words may be semantics, but they become very important. In a sense, that is the difficulty I would see because in my opinion, it is much easier for a province to meet an objective than to meet a



Mr. LeBlanc

C-1605-2

13

April 13, 1988

standard. And once you set standards, then--we know what we are talking about. So, that is the concern.

Mr. Offer: Thank you.

Mr. Eves: I want to thank you for I think a very clear and concise presentation. I think that all the points you have made in it are very valid ones and ones which our committee should be addressing.

~~I want to key though on the two suggestions that you have with respect to clause (inaudible) in protecting everyone's rights under the Charter of Rights and Freedoms..~~

C-1610 follows

(Mr. Eves)

~~Our committee should be addressing~~

1610

I want to key though on the two suggestions you have with respect to clause (inaudible) in protecting everyone's rights under the Charter of Rights and Freedoms and also with respect to the treatment of the aboriginal peoples.

I, perhaps, personally would like to see some amendment especially with respect to clause 16 of the accord, as you would, to protect and make it unambiguous, if you will. But everybody's rights under the charter are protected, and that has been suggested to us by several witnesses.

On the other hand, though, we have had several witnesses that have also testified that that, in fact, is done by the present wording eventhough it may be ambiguous.

Another solution, short of amending clause 16 itself, is to ask the Ontario Court of Appeal through way of reference with respect to this particular problem, whether or not in fact anybody's rights are derogated from or abrogated from under clause 16 of the charter. Would that be acceptable to you? Assuming that we are unable to get any amendment to the actual language of the accord?

Mr. LeBlanc: It certainly would be helpful for future interpretation, really. It would probably satisfy some of the groups that have been raising this issue. I know when Gérald Beaudoin was here before you—I read it in Hansard—he, from his point of view, thought that it was all covered. But then it is when you come with a specific case before the Supreme Court or before courts and you realize then that it is not covered. Our suggestion is that that section be either amended or strengthened or if, for example, an opinion can be obtained from the Ontario courts to say that no, there is no problem, then this probably would help in allaying peoples' fears.

Mr. Eves: Thank you. With respect to aboriginal peoples, I feel very strongly, as do you, that their rights certainly have not been protected by the accord. In fact, they are not even acknowledged as being in the second round of constitutional talks. I understand there may be some discussions under way now that will in fact get them back into the constitutional arena.

However, it was at the suggestion of one of the aboriginal groups that appeared before us. I think as they put it—I do not want to put words in their mouth—dealing with the political reality and recognizing the fact that they probably would not get the language of the accord amended per se. They were suggesting to this committee what, at that time was a novel idea, of a companion resolution which would at least get their item on the agenda for the next round of constitutional talks and would also, of course, deal with their inherent rights of self-government and other issues pertaining to aboriginal people. What do you think of that suggestion?

Actually, as I understand it, the companion resolution is really initiating an amendment to the accord which will have to go through all the legislatures of every province and, of course, have to go through the federal House of Commons. But at least it gets the ball rolling.

Mr. LeBlanc: I think one of the potential flaws in that is the possibility that the aboriginal peoples would not be involved in the constitutional process. This would be the potential flaw in that. In other words, if this companion resolution could come from the federal government as a resolution. And they do ask to be involved in the first ministers' conferences relating to the Constitution as much as they are concerned. That is the flaw I would see in terms—now, I cannot speak for native people, but I could see the flaw legally on that basis.


Mr. Eves: That is a very valid point, but I am certainly not here making excuses on behalf of either the Prime Minister or any of the premiers, but perhaps that problem could be addressed simply by a statement by the Prime Minister and the premiers that they were prepared to include aboriginal people in their discussions.

Mr. LeBlanc: If they were to include in the companion resolution self-government, I do not think it would go very far. But that is another point.

Mr. Eves: Thank you.

Mr. Chairman: Just flowing along from section 16, one of the problems in the accord is in the relationship with the charter, this balancing off collective rights and individual rights. And presumably as Quebec looks at the definition of distinct society and one looks at...

C-1620 follows





Mr. Chairman

~~collective rights and individual rights~~

Presumably, Quebec looks at the definition of "distinct society" and ~~looked at~~ the charter, the charter itself says some things that are collective and some things that are individual. This is not so much in terms of the United Church, but I think I am speaking here to your own background in the area of human rights, both internationally and within Canada. One of the dilemmas then is that one can accept that Quebec being the only French-speaking province with the only French-speaking government would want at certain times to take steps to protect what it saw as the existence of that French-speaking community, however you want to define that and that might have implications, not necessarily but might have implications then for individual rights or at least there is a concern about that.

Do you see that as a problem that just cannot be solved or if there is a clash between a perceived collective right and an individual right that we must be very clear that individual rights take precedence or is that not an issue that in a sense can be resolved and there will always be a certain tension both within the charter and within the Canadian nation in terms of those two rights?

Mr. LeBlanc: There certainly has been a lot of debate about that issue. I am not certain that collective rights are protected under the charter. There is no question that individual rights or the rights of individuals are protected under the charter. There are some clauses which speak of the multicultural nature of Canada but that certainly does not protect the collective rights of ethnocultural groups in Canada.

There is a statement about the aboriginal rights also, but again one has to question whether it protects the collective rights of aboriginals in this country. The charter really protects the individuals of this country so I am not certain of--

Mr. Chairman: So even in terms of the discussion of the language rights within the charter, the education rights and so on, you would see then really that those are addressing an individual's right to education in French or English as opposed to--

Mr. LeBlanc: Yes and they do protect the language rights of two collectivities in this country, but collective rights, there has been a lot of ink spilled on that one. I am not certain how could a collectivity appeal an infringement of rights.

Mr. Chairman: Is that, in your view, one of the basic problems that Quebec might have in accepting a charter override? Perhaps a concern on its part that there might at some point be a conflict with something that it wanted to do in terms of language policy, for example, in the province that might conflict with--

Mr. LeBlanc: If you are speaking of collective rights, you have to speak of the collective rights of French Canadians in Quebec. Really, what we are talking about is an agreement which brings together provinces and the federal government. So we are talking of the authority here of a duly elected government in Quebec. That is what the Constitution is all about. It does not necessarily protect the collectivity or collective rights in the exact sense

Mr. LeBlanc

C-1615-2

17

April 13, 1988

of the word, so what Quebec wants as a government or a province it can do. It is a collectivity that happens to have a government, its institutions, its educational, political, its code of law. So it is a collectivity in that sense but it is a recognized province.

A collectivity would be women. Are women's rights, per se, protected in the charter as a collectivity?

Mr. Chairman: As opposed to as individuals.

Mr. LeBlanc: As opposed to individuals, yes. And what is that collectivity? There has been a debate going on at the United Nations about collective rights versus individual rights and we come down to it, but our Constituion or charter protects individuals, I think.

Mr. Chairman: I want to thank you very much on behalf of the committee for coming here this afternoon and sharing the . . .

C-1620-1 follows



~~(Mr. LeBlanc)~~~~protects individuals. I think.~~

1620

Mr. Chairman: ~~I want to thank you very much on behalf of the committee for coming here this afternoon and sharing the views of the United Church with us as well as answering our questions on the different points.~~

I call upon our next witness, Mr. John Strecker, if he would be good enough to come forward. I think it is fair to say that you have come from the farthest point in Ontario to address the committee, from Kenora I believe. We are very pleased that you could come today. I will let you go ahead and make your presentation and we will follow up with questions if that is all right. Please be seated and welcome.

JOHN STRECKER

Mr. Strecker: I will tell you, I just heard about this not quite two weeks ago so whatever I have here I did the best I could with it and I will answer your questions to the best of my ability.

Mr. Chairman: That is fine.

Mr. Strecker: But this is my own opinion of the Meech Lake accord.

Mr. Chairman: We appreciate very much that during our hearings a number of private citizens have come forward with their own views not necessarily with a particular organization. We do appreciate that and we ourselves are not experts in any sense either, so we look forward to your comments and questions.

Mr. Strecker: This is strictly my own opinion and viewpoint.

My name is John Strecker. I am a former dairy farmer from the beautiful sunset country, ?? on the outskirts of Kenora, Ontario. I have been asked by your group to voice my opinion on the Meech Lake accord.

The Meech Lake accord can sound the death knell for Canada as we know it. As I see it, this agreement could eventually lead to two countries with two different constitutions and two different languages promoting two different and distinct sets of values.

The accord recognizes Quebec as a distinct society within Canada. What does this mean? No one really seems to know. It reads that the role of the Quebec Legislature is to preserve and promote the distinct identity of Quebec, apparently to recognize the existence of French-speaking Canadians in Quebec as well those elsewhere in Canada. It is also to represent English-speaking Canadians outside and inside Quebec. It is to recognize the unique culture and linguistic status of the province.

My question is, why stop there? What about our aboriginal people? History would seem to indicate that they were here long before any of us yet they are not recognized as a distinct society. In fact, some would argue they are not recognized, period. After all, they have been fighting for self-government for years and that seems to be falling on deaf ears.



We have heard of the cases in Manitoba and Saskatchewan which proved the French are entitled to trials in their own language, even if they can understand English. Again, what about our aboriginal peoples?

I am from northwestern Ontario. I believe we have the largest aboriginal native population in Canada. Three years ago, I had several Indian native parolees working for me on my farm. They could not understand why they were tried by a white judge and jury for crimes committed on their own reservations. They, too, would like to have been tried in their own language and by their own people. If the French have been given this consideration in Quebec, why can our natives not be treated in the same fashion, not only in Quebec but I mean in Manitoba and Saskatchewan too?

When the Mulroney government took office, Quebec had not signed the constitutional accord. The Prime Minister hailed the Meech Lake accord as the agreement which brought Quebec into the family, but at what cost? Prime Minister Mulroney claims when he took office two Canadas were emerging. Those Canadians who accepted the Constitution and those who had been left out. He said there is not a one Canada, strong and united.

Given that fact, Quebec issued five ultimatums before agreeing to the deal. It would appear that the province was given a little more to say in the wording of the agreement than any of the other provinces. Is this type of bullying Mr. Mulroney's idea of a binding, unifying spirit? The Prime Minister's kowtowing to Quebec gives light to the argument his drive for the deal was based largely on his detgermination to increase the Tories standing in Quebec.

Quebec Premier Robert Bourassa got everything he asked for before signing: The "distinct society" clause, a Quebec veto on constitutional change, Quebec participation in the section of a Supreme Court judges, constitutional powers over immigration, . . .

C-1625-1 follows



(Mr. Strecker)

~~get everything he asked for before signing. The distinct society clause the Quebec leader wants constitutional change. Quebec's participation in the selection of the Supreme Court judges, constitutional powers over immigration~~ and a limitation on federal spending powers. I have already touched on why I am opposed to the distinct society clause. The fact that it gives Quebec special status. Now, on to the other points.

Just why should Quebec have the power to veto any change. If we are so unified, why should there be such a need. Would we not want to agree on any change. As for the selection of Supreme Court judges, the accord would give the provinces the power to select their own representatives for the Court. Up until now, that has been a federal responsibility. If it is handed over to the provinces, who is to say their choices would have the interest of the whole country at heart. For example, what if the Quebec candidate has separatist leanings. That person would be placed in a position where they would be making decisions affecting the whole country. The rest of us would have no say about it.

On to the immigration clause. Quebec asked that the provinces have control over the number of people coming into the province. Well, it has not been said the logical assumption would be that in keeping with their distinct society and culture philosophy, they would likely give preference to the immigrants who could blend in with more ease namely, those who could speak French.

Finally, Quebec asked for a limitation of the federal spending powers. In other words, if the provinces are not keen on the wording in a federal provincial cost sharing plan, they could change the wording to better suit themselves. The federal government would still handle their share of the money but the provinces would have the final say in how the money would be spent. That would naturally lead to the provinces vying for more and more power. Ten provinces all power grabbing. Is that Mr. Mulroney's vision of a unified country?

As I mentioned earlier, I am from north western Ontario. Because of its proximity to Manitoba, people from my area have always felt a kinship with that province. Manitoba has long been considered one of the country's have not provinces. It is one of the provinces which has been pushing for Senate reform, namely a triple-E Senate, elected, effective and equal. Opponents to the Meech Lake accord have said there is no way Ontario and Quebec will ever be persuaded to accept the triple-E Senate. Because Quebec has the veto, it has the power to make or break proposed changes to federal institutions, like the senate before the House of Commons. So any changes have to clear to for ?? orders. First of all, the province has to reach agreement. Then they must hope Quebec does not like the change at one ?? . Why should any one province be able to dictate to the others, which supposedly are fair and equal partners.

In 1759, France lost control of Quebec at the battle of the Plains of Abraham, after that it was a very ?? . As New France, which consisted of Quebec and a small part of Ontario, had been defeated, it now had to accept British rule and the English language. Why now, 100 years later are the rules changing. Why is the rest of Canada being forced to make amends in an issue so long ago decided. The rest of Canada was part of the British empire because all the water that floated into Hudson's Bay and the Arctic basin along to

W. Strecker

C-1625-2

21

April 13, 1988

Prince Rupert's land. Nova Scotia and New Brunswick already were gone with the expulsion of the Acadians. So all they had left was Quebec and that little fringe of Ontario that probably run up to where our northwestern Ontario starts, at the frontier of ??.

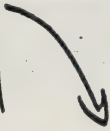
So far, I have been speaking solely about the provinces concerned. But we also have two territories and they have reason to be concerned as well. For decades, our neighbours to the North have been struggling for recognition. Now they learn, if this deal goes through all the Premiers will have to give their consent before any part of the Yukon or the Territories could be created into a province. But the provinces now in existence could extend their boundaries into the Territories without the consent of any ?? or jurisdiction in the North.

North West Territories Justice minister, Mike Ballantyne makes a good point when he says: "?? if the provinces would extend into other provinces." He used Manitoba as becoming western Ontario and Prince-Edward Island as being annexed to Nova Scotia as examples.

Former Alberta Premier, Peter Lougheed, has already suggested extending that province's boundaries into the resource rich North. It is an insult to the Northerners that the provinces would be given the power to displace Legislatures and democratic institutions in the Territories.

We have expressed an all encompassing desire through this agreement that refers to Quebec's French, to recognize their distinct society, but in the same agreement...

(C-1630-1 follows)





(Mr. Strecker)

~~... legislatures and democratic institutions in the territories.~~

1630

~~We have expressed an overwhelming desire through this agreement to be fair to Quebec's French, to recognize their distinct society, but in the same agreement we give ourselves the right to take over an area long inhabited by aboriginal natives and we do not make any effort to preserve their cultural identity. In fact, the safeguards regarding linguistic minorities such as the ??Deney, Inuit and ??Innuviat are pretty much nonexistent.~~

Northern leaders have tried just about everything including appealing to our morals to try to have this accord put aside but to no avail. The Yukon and the Northwest Territories both lost a court bid to have the accord declared a violation of the Charter of Rights. The Alberta Court of Appeal ruled the charter could not be used to challenge any other parts of the Constitution, but the Northwest Territories executive council has not given up and neither should other concerned Canadians.

The Meech Lake accord in its present form is unacceptable. If it is not scrapped, it should at the very least be revised and clarified. The fact that not one word or comma can be changed is absurd. It is too hard-line to say, "With any alterations, the deal falls apart." This sounds as if those who drew up the agreement were insecure about what it contained and they had to be rigid for fear that it would all collapse. We are talking about our future. How can tired, bleary-eyed politicians working 20 hours straight, fuelled by nothing but a ham sandwich, make fresh, clear-headed decisions affecting the direction of our whole country? The Meech Lake accord profoundly affects each and every one of us. It should not have been drawn up in the dead of night in haste and secrecy.

I have spoken a good deal about the French. I would like to make it clear I am not some red-necked bigot. I am a Canadian who fought for and deeply loves his country. It upsets me a great deal to see this accord, which tried to correct a perceived problem by overcorrecting it. The French want consideration, but with this deal we elevate their status to a level far above other Canadians. Once again, our native people come to mind. They were here before the French, the English or anyone else.

What am I to say? Where does this all end? This agreement has encouraged anti-French attitudes by virtue of the fact that it is not fair and it is not for all Canadians. We must not let the Meech Lake accord tear our country apart. Thank you for listening to me.

Mr. Chairman: Thank you very much, Mr. Strecker. I must say you have looked at all aspects of the report and clearly have done a great deal of reading and thinking about it. You have put forward a number of points and suggestions which have come up at other times in our hearings but not necessarily in the perspective you have brought to them. We appreciate very much your taking the time to do that.

We will start the questioning with Mr. McGuinty.

Mr. McGuinty: I am always wary when somebody begins his remarks by

Mr. McGuinty

C-1630-2

23

April 13, 1988

saying he is just an ordinary citizen and has no expertise and then goes on to give a very thoughtful, compelling and in some aspects very convincing presentation. I thank you very much for your very thoughtful and sincere rendering of your own views. It would be very sad if the word got out to the community that only experts versed in law were qualified to have opinions on this type of thing. Certainly that is not the situation.

Mr. Strecker, I tell you the problem I have and ask for your advice from your perspective. I too have concerns with aspects of the Meech Lake accord, the implications with, say, women, their concerns. I have listened to the expressed concerns of native peoples, English minorities in Quebec, French minorities outside Quebec. It has been suggested to me by a number of people who have had very long experience in matters of constitutional revisions over the years that while these are aspects of the accord which, by reason of concern, it is suspected that Quebec at this time would not reconsider the accord in terms of amendments, and to require amendments to the accord in these issues would be, in effect, to take an action which predictably would--

1635 follows



(Mr. McGuinty)

~~predictably would~~ torpedo our opportunity to bring Quebec into the Constitution at the present time. That is the position that people have expressed; that is, perhaps we should go along and accept the accord in its present form and then go on in the future to explore and make—what do we call them, Mr. Chairman, companion—

Interjection: Companion resolutions.

Mr. McGuinty: —resolutions follow after. What is your view of that approach, Mr. Strecker?

Mr. Strecker: As far as I am concerned, I would like to see a lot of debate on that before accepting any of the accord, because if Quebec has a veto power, that would be just like Russia at the United Nations 30 years ago. You will get nowhere. If the Russian says no, or Bourassa says no, what are you going to do? We do not need to listen to one man. That is what we fought a war for, for democracy, for the right of speech, for all Canadians.

Our mother tongue should now be English no matter if we come from China, Japan, Turkey, Russia, Germany, Austria or no matter what it is. We should forget about these—sure, culture is all right, in its place, but this is a united country we are talking about.

First of all, Quebec wants to have its little linguistic and cultural distinct society. Then the west is talking about separating. What are they going to separate with? We need the whole country together. We do not want it apart. I would not give in one iota at all until the thing is talked over. As I said, a deal that is made in 20 hours is no good—in the dead of the night, the men are tired. They wanted to go home. He kept them there. They signed the agreement. That is nothing. That is not democracy. That is not even business. You would not make a business deal that way. This is running the country. This is Canada. This is not some South American or Central American republic. This is here.

This is what I was over there for nearly five years for, eating hamburger—not hamburger but mutton and cheese, but you got a good meal. I do not know. I could not solve the problem. I wish I could. I think if I were given a couple of months with about half a dozen that looked into it, we could come up with something. To accept any of that accord in its present form—it is pretty hard to swallow.

Mr. Offer: Mr. Strecker, I would like to thank you for coming before the committee. I think it is very important that this committee hear not only from the large associations and the eminent scholars of all different fields, political science, history and legal fields but also from the individual who has sat down and thought about this particular matter and how he feels it will affect him as a Canadian. I think you should be commended for coming to this committee.

I would like to ask your opinion on the whole question of process, and in this respect we are talking about not only the Constitution. You have gone into that in some detail. We are also talking about a process by which Canadians such as yourself will have an opportunity to give us your opinion. My question to you is—that this committee will be dealing with how we can



Mr. O'Re

C-1635-2

25

April 13, 1988

best obtain that input. I guess we are also going to have to come to grips  
with whether—

C1640 follows

(Mr. Offer)

~~that this committee will be dealing with how we can best obtain that input~~

1640

~~I guess we are also going to have to come to grips with whether a~~  
provincial Legislature should be available to the people of this province to obtain that type of input.

I would like to get your opinion as to whether you think there is a role for provincial legislatures to play, or whether we should say, "Well, this is a federal committee and that is all there should be." I want to hear from you as to whether you believe a provincial Legislature, however it is composed, ought to play a part, so that you can have a place to make your comments.

Mr. Strecker: I think it should be. I think it should start right at the grass roots, right in the municipalities back home, right from the township all the way through, right from the reeve and the councillors, the town and the mayor, and right through to the province. I think they should play a bigger part than the federal government. When they get all this information together, then they should approach the Prime Minister, and not that he says, "This is the way to go, or that is the way to go."

Mr. Offer: So in your opinion the province, and this Legislature, and whatever committee, such as the committee as it is—

Mr. Strecker: Yes. These committees here, they should all take part. They could send out questionnaires, draw them up properly and ask all the people about their different viewpoints. They could have about 50 or 100 questions on them, and let them answer as many as they feel like. They should get everybody's viewpoint on it, from the native right through to the person who ended up in a reformatory or a jail, because he has ideas too.

I tell you, I am speaking from a little experience because I was in Belgium during the war. If the people think at that time that that was a smooth-running country, because there were two different languages like the Flemish and the French, they have another thing coming. I do not think there was a great love for one another. I do not hardly think so, because I do not want to push ??Belgium back there, and we were there. We knew what it was all about.

Mr. Offer: I thank you for your comment because we are going to be dealing with the whole question of process. It is going to be very important to have on the record the response which you have just made that you as a Canadian living in this province feel that there is a very definite role for the Ontario Legislature to play in obtaining public input.

Mr. Strecker: Absolutely, and it does not matter which party it is.

Mr. Offer: No, it does not.

Mr. Strecker: It should be coming right from the Legislature here.

Mr. Offer: Thank you.

Mr. Strecker: Okay. Thank you very much.

Mr. Chairman: Mr. Strecker, thank you very much for coming and joining with us this afternoon. Again, we appreciate your taking the time not only to prepare your submission but also to come from Kenora to be with us this afternoon.

Mr. Strecker: Okay. I thank you very much for having me here.

Mr. Chairman: I will just tell the committee that we will now take a recess until 5 o'clock. One of the witnesses was unable to come. Our next witness will be at 5 o'clock.

The committee recessed at 4:45 p.m.

1700  
follows





1703

Mr. Chairman: We can come back to our session. I would like to welcome our next witness, Kirk MacGregor, who is here in his capacity as a private citizen. We want to welcome you hear this afternoon. As we have said to a number of people who have come forward as private individuals, we really appreciate your taking the time and effort to put together your thoughts and join with us this afternoon. I will turn the mike over to you, and if you would go ahead with your presentation, we will follow up with questions.

KIRK MACGREGOR

Mr. MacGregor: When I heard from John Craig that I would be able to make a presentation here, I somewhat considered calling it off right then, because I certainly am not expert enough to tell anybody exactly what the Meech Lake amendment will amount to. I am sure I am not going to tell you anything that you have not heard 27 times already. Actually, right about now, I would rather be back at work instead of taking time off and coming down here.

Mr. Chairman: We are glad, nevertheless, that you took the time. I think we often feel that perhaps for many, the thought of coming before a legislative committee-- We were joking earlier about all the wires and technology of this room. Basically, what we are trying to do is to get the views of individuals, so I am glad, whatever was going on in your head at that particular moment in time, you refused the voice that said no and accepted the voice that said yes.

Mr. MacGregor: At any rate, I figured there was one reason to come, which was simply to say that one more ordinary citizen had read Meech Lake, thought about it, felt that the odds were that it would be bad for Canada and was willing to make the effort to come down here and say that.

Before I go into things that you have no doubt heard many times before, I would just like to explain that I am going to use the term "Meech Lake amendment" for this amendment. It is a constitutional amendment. I think the word "accord" is just a piece of skillful publicity for it. I would rather look at just the thing itself without that piece of hype . . .

C-1705 follows



~~constitutional amendment. I think the word "accord" is just a piece of  
skillful publicity for it. I would rather look at just the thing itself  
without that piece of lip hooked on to it.~~

As for what I do not like about it, frankly I do not think I have seen any objection to it that I could not at least partially agree to, but four among them particularly strike me.

First is the antidemocratic aspects of the amendment, which fall into three general areas. One is the way in which it is being railroaded upon Canada with a minimum of public consultation, or at least it was prior to hearings such as this. Two relates to how it is likely to work if it is passed.

Just in passing, one suggestion that I am inclined to make is that the problem of it being railroaded in a rather undemocratic fashion is quite soluable within Ontario in that if it were given a free vote on the amendment with an adequate amount of time for MPPs and constituents to communicate, this would essentially eliminate any objection that it was done in an undemocratic manner.

As for the undemocratic aspects that are likely if it is passed, these fall into two general areas. A sort of minor one is the annual conferences between the premiers and the Prime minister, which tend to shift a certain amount of power and initiative away from directly elected representatives to a more indirectly created body.

The second is that there are definitely things in the accord, the meaning of which is only going to be determined by what the courts say they mean. This again transfers power away from elected representatives to a nonelected court.

Going beyond that, my second concern about it is that it is murky and self-contradictory in its language. There are a number of examples of that. One can be found near the beginning of it where it says, "The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph 1B is affirmed." Then it goes right on to say, "Nothing in this section derogates from the powers, rights or privileges of Parliament." It is not clear how Quebec can do more without Parliament being restricted to doing less.

One can note it also in the agreements on immigration one possible interpretation of them, I guess, would be that they are simply the same as the original section 95 with a few little differences in wording. Then again, it says, "With regard to amending agreements made between the federal government and a provincial government, an amendment to an agreement referred to in subsection 95B(1) may be made by proclamation issued only"--and so on--"only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement." This implies that the federal government loses its ability to override in matters of immigration. Certainly, immigration is one of the key things controlled by a sovereign state. Once again, what does this mean?

There are a few other little examples, comments like, "Nothing in this section extends legislative powers of the Parliament of Canada or of the legislatures of the provinces."

C-1710 follows

30  
April 13, 1988

mg

(Mr. MacGregor)

~~Comments like, "Nothing in this section extends legislative powers of the Parliament of Canada or of the legislatures of the provinces."~~ Mind you, that particular one, I think I picked one that I did not really want, that I had marked out there.

1710

The last interesting one is this general section right at the end, "Nothing in section 2 of the Constitution Act 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act 1982 or class 24, section 91 of the Constitution Act 1887." Yet when you go back through the various amendments, section 2 of the Constitution Act of 1867 is now section 2 in the Constitution amendment, 1987, which has the business about the distinct identity of Quebec in it. Whereas section 27 of the Constitution Act 1982 says, "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." So once again, which is going to go in Quebec, multicultural heritage or the promotion of the distinct identity of Quebec as seen by the Quebec government?

I think that covers some of the main examples there.

My reaction to this is that as a constitution, I find something like this appalling. A constitution ought to be a clear statement of principles that can be followed with a minimum of interpretation, or at least that is how I feel it should be.

There is a feeling that a constitution should be totally obscure and open to interpretation, so that say the constitution is hard to amend, like the Canadian one tends to be, then it can adjust to the times by the courts reinterpreting it. Frankly, I would rather have a comprehensible constitution that is adjusted to the times in a democratic manner rather than a murky one where the courts decide what it means and the elected representatives do not have too much say in it.

So much for murkiness and another hack at undemocrateness.

Another thing that concerns me about the Constitution or about the Meech Lake amendment--and to a certain extent, it has always concerned me about Canada. To some extent I have always had that slight feeling of incompleteness, that one year I might wake up and find that I had lost a part of myself because my country was gone. Meech Lake is another step in that direction. At least, the best guess I can make is that it is another step in that direction. It is very hard to be sure what it means.

By giving the provinces more control over the Senate and more control over the Supreme Court, not to mention whatever additional practical influence they get by these annual conferences, it will tend to provincialize the country to at least some extent. Obviously, the extent depends on what the Supreme Court says when conflicts over the various things that I have mentioned are brought to it, but with three members of the Supreme Court from Quebec and the others partially picked by provincial governments, which are generally not likely to pick . . .

C-1715 follows



(Mr. MacGregor)

~~...Supreme Court from Quebec and the others partially picked by provincial governments which are generally not likely to pick strong federalists.~~

It would be fairly easy for the Supreme Court to wind up deciding, in a way that tends to provincialize the country. Also, the whole thing has the potential for being the beginning of a slippery slope, because it makes it a bit easier for provinces to get power from Ottawa, so all you need is, once a decade, a weak federal government and the provinces interested in some more power, and the power gradually moves from the federal government until possibly Canada becomes essentially a collection of 10 different countries, in all but a few little bits of name.

Once again, whatever that means in purely bureaucratic terms and in terms of interfering with people who want to move from one province to another, it still, at some level, hurts me in the heart to think of my country being broken up like this.

At any rate, the fourth main thing that concerns me is that any trend towards provincialization of the country is likely to be irreversible, simply because the key aspects of that, the Senate and Supreme Court, require unanimous provincial consent to reverse and I do not see any way that would ever occur. So whatever breaking up of Canada might happen is unlikely to be reversible by any legal means. It basically offers a risk, never a certainty. It is always possible that the Meech Lake amendment will be passed and that it will be interpreted in such a way as to have no effect at all. No one can exclude that possibility.

But certainly, there are many experts who do not believe that possibility and, on reading it, I think the balance of probability is that it will do something, to some extent, to break the country up a little bit, maybe a lot ultimately. And I can see eventually, as a very real possibility, getting to a situation where either it becomes necessary to resort to the sort of thing that we are justifiably proud of always having avoided, like war or revolution, to put the country back together; or sort of, one by one, over the decades, the provinces will wind up joining the United States or something.

At any rate, because of these things, I would like to finish basically by just asking you to do whatever you can--first, to make the initial process democratic by having a free vote in the Ontario Parliament, and second, to discourage the thing. Thank you.

Mr. Chairman: Thank you very much. I think, earlier this afternoon, our colleague, Mr. McGuinty, in commenting to another private citizen, noted that people often come before the committee as private citizens and feel that they perhaps should just indicate they were not sure whether they wanted to come or that they were not expert. Then they would go ahead and deal with any number of points in the accord in a very succinct and articulate way.

I think it only serves to underline the importance of getting more of that kind of feedback and it, in a sense, deals with your last point. But if I could, we have thought a lot, as members of the committee, about process and really looking at the fact that, in the future, whatever happens to the Meech Lake amendment, provincial legislatures are somehow going to be involved in constitutional amendment procedures in the future and we are going to have to ...

1720 follows

(Mr. Chairman)

~~to the Meech Lake amendment, provincial legislatures are somehow going to be involved in constitutional amendment procedures in future and we are going to have to ensure that the kind of discussion that we are having with you today can go on much earlier in the process, so that, as ideas are brought forward, people have an opportunity to think about them, some time for reflection and then, to come forward and say, "Well, look, I have this concern," or "I support this part, but I am concerned about that."~~

1720

I think your comments today underline that to a great extent. Can I ask one question? Now you have noted, as have others and I think, probably those of us around this table would relate to a number of the concerns that you raised with one of the principle aspects being that we are not sure perhaps, what this or that might mean. It might not mean much. It might mean a lot.

When we look at our Constitution, if we go back and look at 1867 and we compare that to the United States Constitution or the French Constitution, we are clearly dealing with a pretty different animal. We have not, in Canada, made our constitutions ringing documents. Even the charter which is, perhaps, as close as we have come to some sort of grand declaration, has some elements in it, such as section 33 where a lot of people would express great concerns about how it was put together. It seems to be the Canadian approach that, you know, you have a lot of compromises and so on that you, in fact, do bring together.

I suppose what those who would be arguing in favour of the Meech Lake accord would be saying is that: "Look, this is one phase of what has been several phases, and there will be other phases, and we shouldn't be concerned about trying to get everything into this one. But, if you like, the term has been used, this is the Quebec round. We still have to have a multicultural round, an aboriginal round, you know, a variety of rounds."

What is your sense, as we proceed with this agreement, that the 11 first ministers reached? Do you see it as being something that is amendable or do you think it really should be set aside and everyone should go back to the table and start again?

Mr. MacGregor: I do not see any realistic possibility of things like the change to the Senate and the change to the Supreme Court being reversed, once made. So I do not think either of those, in particular, are things that we should just jump into, on the assumption that anything that is not working right can be fixed later.

Basically, an amending formula that requires unanimous agreement by everyone is very unlikely to happen and, at the same time, once we have increased provincial power to this extent, I think there is a real risk that it will splinter the country fairly badly.

Another thing is, you know, speaking in terms of Quebec in particular, I am not at all convinced that the Meech Lake amendment will head off separatism, rather than encourage it. It does tend to further isolate Quebec from federal institutions and give it the opportunity to become more inward looking. As far as I know, from just sort of casually reading and hearing

Mr. MacGregor

C-1720-2

33

April 13, 1988

things, there are at least a few Quebec politicians who have said outright that, from that standpoint, as far as they are concerned, that is the purpose of the Meech Lake amendment, to facilitate building up to separatism.

Looking aside from Quebec, even if we do want to give Quebec more of a special status, I think we should also be paying some attention to the condition of the rest of the country. If we should go a two-nations route, let it be a two-nations route, not one nation, Quebec, and a pile of ...

C-1725-1 follows





~~should also be paying some attention to the condition of the rest of the country and if we should go a two-nations route, let it be a two-nations route, not one nation, Quebec and a pile of rubble, the rest of Canada split hopelessly into nine highly divided provinces.~~

Mr. Chairman: And your reading of what is there is that would be the result.

Mr. MacGregor: I cannot predict the result. The possible results range from all the most idyllic dreams you could have for this which I agree is possible--I do not see it as being at all likely--through to starting a process which over a period of decades eventually disintegrates the country and anything in between. It is entirely possible that no great harm will result from it but then it is also pretty clear that no great harm will result from not doing it. So why take the chance?

Mr. McGuinty: In your written statement you refer to a process of splitting Canada into a mess of barely united provinces and then just a moment ago, you referred to perhaps the end product might be one nation and a pile of rubble. You go on to state, ?? "As the Meech Lake amendment give the provinces significant control over who is on the court, plus a degree of extra influence on the federal government by the Senate, there is little reason to expect anything other than a slow dismemberment of Canada."

I guess no one of us want to wake up and find that our country is gone whether by erosion or by catastrophe but I would ask you to examine that reference you have now with regard to the Senate and the Supreme Court.

The fact is first of all, as I understand it, the federal government would not necessarily be bound by the recommendations of the provinces in this regard. That is one consideration.

Secondly, it seems to me that what this is doing, in effect, is formalizing what is already being done. When members are appointed to the Senate, they are with reference to the geographical dispersement and likewise to the Supreme Court.

With regard to Quebec being a distinct society,--I lived in Quebec for 16 years, for four months a year at least--what that phrase I think really means is that we are stating what is already there; a group of people bound together by the essentials of nationhood, culture, language, history, religion.

My question is with regard to the Supreme Court and the Senate, why should that be interpreted as something which will have as its end result the formation of one nation and a pile of rubble or the slow dismemberment of Canada? I cannot put the kind of dramatic after effects upon these that you do. Why do you interpret that in this way?

Mr. MacGregor: It is impossible to predict what will happen but certainly one possibility is that all these ambiguous things in the accord will be interpreted the way provincial governments looking for more power would like them to be interpreted. Given the various things that are confusing or even outright self-contradictory, a lot of this is inevitably going to go before the Supreme Court.

Mr. MacGregor

C-1725-2

35

April 13, 1988

At present, while the members of that court are picked in terms of coming from various geographical areas, they are not, shall we say, censored by the provincial governments. With them being limited by both . . .

C-1730-1 follows



(Mr. MacGregor)

~~in terms of coming from various geographical areas, they are not, shall we~~  
~~say, censored by the provincial governments. With them being limited by both~~  
the provincial and the federal government, they quite possibly could have more  
of a pro-provincial blend than they now do. Given that Quebec is likely to be  
in favour of a high degree of independence for itself, quite without concern  
for other provinces and that thus three of these justices are likely to have  
been selected for their being at least somewhat favourably disposed to a high  
degree of independence for provinces, it strikes me as likely that at least  
some if not most of these ambiguities will eventually be decided in favour of  
the provinces.

1730

Also, I do not think the provinces are at any point going to want less  
power. It is always nice to have more power for your own government and I  
think it is just going to shift the balance in this pressure between provinces  
wanting power and the federal government wanting power. I see a real  
possibility that you would get a situation where every now and then a bit of  
power got transferred from the federal government to the provinces partly by  
the courts making decisions on the basis of Meech Lake and partly by it just  
being decided in these constitutional conferences. While I cannot begin to  
offer any sort of a reliable prediction of what that is going to do, I think  
it is likely to split the country up into provinces a bit more than it is now  
and it could go all the way.

I cannot prove it will go all the way. It may just go a few little laws  
and stop. But given that one of the provinces, namely Quebec, is basically in  
favour of highly independent provinces you have that bias built into the extra  
power that has been given to the provinces in the Supreme Court and the  
Senate. I think it is likely to start splitting the country up into provinces  
to some extent. I do not see a mechanism that would make it stop at a certain  
point. I think splitting would just gradually accumulate as the decades go by.  
Maybe I am wrong.

Mr. Chairman: I want to thank you very much for coming down and  
joining with us this afternoon. We appreciate not only the brief you have  
presented but the comments that you made. I think no one on the committee  
could help but recognize the strong feelings that you bring to this issue. We  
are going to be wrestling with it for some time to come and we thank you very  
much for being with us this afternoon.

Next, I call upon the representatives from the Registered Nurses'  
Association of Ontario: Eleanor Ross, the president, Gail Donner, the  
executive director and Diana Dick, the project manager. This is, I suppose, a  
week for Queen's Park and it is nice to see you all again. I wonder if just  
before you begin, if you would just let me make one brief announcement while  
you get your papers organized.

To the members of the committee, I have learned from the clerk that  
today John Craig who has been assisting the clerk through all of our hearings  
and who is a co-op student from the University of Waterloo, his period has  
just about ended and he is going to be leaving us. I just wanted, on your  
behalf, to say to John how much we appreciate all the help he has given us  
through the last three months or so of the committee's hearings and we wish  
him well back at Waterloo.



Mr. Chairman

C-1730-2

37

April 13, 1988

We will then simply turn the mike over to you. We have a copy of your brief and if you want to take us through, we will follow up with questions.

~~REGISTERED NURSES' ASSOCIATION OF ONTARIO~~

~~Ms. Ross: Thank you for the opportunity to present.~~

C-1735-1 follows



~~if we could then simply turn the mike over to you, we have a copy of your  
brief, if you want to take us through it and we will follow up with questions.~~

Ms. Ross: Very good. Thank you.

REGISTERED NURSES' ASSOCIATION OF ONTARIO

Ms. Ross: Thank you for the opportunity to present. We realize that it is the end of a long day for you. Our brief is short, so I will read it since you have not had the brief prior to this. OK?

Mr. Chairman: Fine.

Ms. Ross: Basically, to begin, the Registered Nurses' Association of Ontario, or RNAO, is a voluntary professional organization, which represents registered nurses and promotes the profession of nursing in Ontario. Nurses, the single largest group of health care providers in this province, speak for health and advocate on behalf of Ontario residents for healthy public policy and programs.

RNAO commends the efforts of the Premier of Ontario, along with his provincial counterparts and the Prime Minister, to reach an agreement, which allows Quebec to become a full, political partner in Confederation. However, we are seriously concerned with respect to the effective of the accord in three major areas. There are many questions which remain to be answered by the signatories of the accord.

Numerous groups have appeared before you presenting a range of concerns. Our concerns centre around the equality provisions, the future shared-costs program provisions and the process by which the accord was signed. We are also concerned about the future of Canada as a federal state with the power of national leadership.

To begin, our analysis stems from the World Health Organization, WHO, the goal of ?? "health for all by the year 2000." This goal, agreed to by the 134 participating countries at the Alma Ata conference, ?? Union of the Soviet Socialist Republics, in 1978 is intended to mean that all people of the world would have equal access to the knowledge and resources that make health possible.

The conference strongly reaffirmed that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important, world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector.

Health is affected by many factors, such as adequate income, nutrition and housing, clean air, clean soil, clean water, protection from the threat of nuclear spills and warfare.

The health of individuals, communities, our province and our nation is also affected by access to equality, access to universal and comprehensive health care and the clear sense that we can participate as full citizens in helping to share the future of our country. These three factors are

particularly important in the light of Constitution-building.

We in Canada are fortunate to live in a democratic country, rich in resources. Ontario is particularly resource rich not only with respect to our natural resources but with respect to the resources that come from people and their productivity and service. We have another key resource, which is a commitment by our Premier that his administration will be governed by the concept of open government.

First, equality--the impact on health. Access to equality is one resource that brings us closer to the WHO "health for all goal." RNAO is deeply concerned that the 1987 accord puts equality rights of women and other groups at risk. In 1981, after a long struggle, equality rights for women were guaranteed in the Charter of Rights and Freedoms. An accord which puts those hard--and I wish they were won, but--won rights at risk is unacceptable.

Our recommendation is to amend the accord to read, "Nothing in the accord will derogate or abrogate from any of the rights or freedoms guaranteed in the Charter of Rights and Freedoms."

Second, the access to future shared-cost programs--its impact on health. As the accord now stands, it would be possible for provinces to opt out of future shared-cost programs provided these programs are compatible with national objectives. RNAO is concerned that the accord does not mention the standards of universality, accessibility, comprehensiveness, portability and public administration. These standards have been the cornerstones of national health care ~~systems that has served~~

C-1740 follows





~~comprehensiveness, portability and public administration. These standards have been the cornerstones of the national health care system that has served our citizens well.~~

1740

RNAO shares the concerns of the Canadian Nurses' Association on the opting-out powers provision of the Meech Lake accord. That, I believe, is appended in the submission.

The maintenance of a universal health care system is of paramount concern for all Canadians. Along with CNA, RNAO "strongly supports this principle and believes that universality could be threatened by the accord. The public health care system in Canada must remain accessible and portable."

Our recommendation is that the accord be amended to require that provinces meet both national objectives and standards in order to be reimbursed for future national shared-care-cost programs; that the federal government retain the power to introduce and enforce national programs, which will benefit all Canadians regardless of the province in which they live.

Third, the citizen participation in Constitution-building—its impact on health of individuals, communities and our country.

RNAO regrets that the process which led to the signing of this accord has been offensive to most Canadians. As we have indicated, Canada is privileged in that it was founded as a country based on the principles of democracy. The Constitution of Canada belongs to Canadian citizens. Canadians must have the opportunity for full consultation in the making of our Constitution.

The process which has been used for the signing of the 1987 accord and subsequent events, both federally and provincially, in Ontario has contributed greatly to the public cynicism about the political process and indeed the politicians.

Our recommendation is that a process of meaningful public consultation takes place now and in the future to ensure that Canadians can fully participate in shaping the Constitution of Canada.

Fourth, the future of Canada as a federal state—the health of our country. The veto power granted to each province in the accord will make the future constitutional amendments extremely difficult to obtain. The veto provision makes it less likely that Canada will be able to develop as a nation. The prospect of the Yukon or the Northwest Territories becoming provinces is less likely.

Our recommendation is that the pre-accord amending formula be fully incorporated in the Meech Lake accord.

Conclusion. The notion of a companion resolution recently suggested by some members of this committee is unacceptable to RNAO. This action would address only process, not substance. It is too little process too late.

RNAO participated in the 1980-81 constitutional lobby, which succeeded

Ms. Ross

C-1740-2

41

April 13, 1988

in securing constitutional rights. We are here before you to reaffirm our commitment of the integration of a constitutional democracy and the health of Canadian citizens. The Meech Lake accord imperils hard-won constitutional rights and protections and, in so doing, imperils our health.

RNAO urges you, as members of this select committee to safeguard those rights, protections and our health for this generation and for future generations of Canadians.

Mr. Chairman: Thank you very much for a very clear and succinct presentation. I think the areas that you have hit on are obviously ones that others have as well. The perspective in particular from the whole health care side is interesting and I think we want to explore some of those implications. We will start the questioning with Mr. Eves.

Mr. Eves: I want to congratulate you on your well-thought-out brief and presentation here today. I note that every one of your recommendations ends up in suggested amendments to the Meech Lake accord. Actually one of the questions I was going to pursue with you, you have taken care of or answered in your conclusion by saying that the notion of companion resolutions or resolution is unacceptable to your group. In your opinion, it would only address the matter of process and not substance. As far as you are concerned, it was too little process too late.

C-1745 follows



(Mr. Eves)

~~No far as you are concerned, it was too little process too late.~~

Although I am sure there are several members on the committee, perhaps all members on the committee would like to see some part or other of the Meech Lake accord amended. We are also faced with the political reality that both the Prime Minister of Canada and the Premier of Ontario have said quite simply that they will not entertain any amendment whatsoever with respect to the accord because they feel it has to proceed as agreed upon by the 11 first ministers. There may be some concerns it can be addressed in the future, either by way of future constitutional conferences or get the ball rolling early, I suppose, by the novel suggestion of companion resolutions.

With respect to section 16 and equality rights, and actually much bigger than that, I think not only equality rights but the rights of everybody at risk in society. My own personal feeling is that if there is one section of the accord that should be amended, it is certainly that one. There is some ambiguity. We have heard constitutional experts, as you are probably aware, on both sides of the issue. We have heard legal experts on both sides of the issue. Some say that it does not abrogate or derogate from anybody's right in the charter and that is what they intended. Others say that there certainly is at least a very real possibility that it will at some point in the future.

What is your thought with respect to the idea if we are not able to amend any part of the accord, and especially section 16, of referring that to the Ontario Court of Appeal for a court reference and see that at least everybody knows where they stand, whether somebody's rights will be abrogated or derogated from?

Ms. Ross: I will let Diana answer that one.

Ms. Dick: It carries with it a lot of risk. It certainly has been raised with us, but I think that the timing of that reference would be absolutely crucial and that it would be crucial for no further ratification until we have that decision.

Dr. Donner: Just if I might add in relation to the comment, Mr. Chairman, about the political realities, we also deal daily with political realities in a voluntary professional organization, but our concern is that is the perception of many Canadians that there has been too much political reality and not enough concentration that citizens' need and expect and sometimes we are all faced with the necessity of biting some bullets and admitting some things may have to go back to the drawing board. With respect, I would submit our position, as we have stated here, is that this is too important to let political reality, if you will, be its number one driving—

Mr. Eves: I quite agree. It is not me you have to convince.

Dr. Donner: No, but I think since you did raise it, it is of concern that we have had and as a matter of fact it was what went into our organization's debate and discussion as to why we should, through a voluntary nursing organization, come here and talk about this. It has all been signed, sealed and delivered. We think that if there are enough citizens and others in the country who feel that what was signed, sealed and delivered should go back to the drawing board, then we have to say so.



April 13, 1988

Mr. Eves: Thank you.

CH Mr. Offer:

I Thank you very much for your presentation. I want to carry on a little bit with the line of questioning of Mr. Eves and, in particular, your recommendation with respect to the process being one of meaningful public consultation. You say that is what it ought to be. We have, I think, since day one in this committee grappled with that problem. We have heard many representations on that particular matter. I was wondering if you have directed your mind to what type of process, in your opinion, would meet the phrase "meaningful" as indicated in the recommendation?

~~Dr. Donner: This is meaningful and this is part of it. I guess the concern is~~

C-1750 follows

~~(Mr. Offer)~~

~~the phrase "meaningful" as indicated in the recommendation~~

1750

Dr. Donner: This is meaningful and this is part of it. I guess our concern is that this be meaningful and that the comments which Mr. Eves made and which we made around continuing that paying attention to is part of what we referred to.

Ms. Dick: I would also add, that by "meaningful" we would like to suggest that "meaningful" means that in consultation there would then be some changes. Otherwise, it is not meaningful, it is simply a presentation of concerns. Then the decision goes forward without consideration of those concerns.

I believe everyone in this province had great hope when we had the promise of open government. I think it would be well to recall that promise and to live up to that promise. I think it is a real disappointment if indeed we cannot live up to that promise.

Mr. Offer: If I might, just by supplementary, the Meech Lake accord aside, there are going to be ongoing talks, discussions, first ministers' conferences, surrounding constitutional reform. It will continue. In what areas, we do not know. We know that the Meech Lake accord speaks to two areas alone.

If that is going to happen—and I do not think there is anyone who thinks it will not happen—should there not be a framework to obtain public input prior to a final decision? Should there not be input in order to determine what should be on the agenda? In your opinion, is there a role for the province to play in such a setup? Should the province have a framework for constitutional input from the public? I am wondering if you have thought as to what type of framework we might want to keep in mind when we are grappling with this question, because we shall be.

Dr. Donner: I think it is a good question. I do not think we paid particular attention to that, so I think our comments would be what comes to mind right at this time. However there already is, through the democratic process, a vehicle by which citizens can— We are firm believers that the process can work, that citizens can make their concerns around any issue that is before them known to their elected representatives.

I would go back to our word "meaningful" here. Whether it is Meech Lake or any other opportunity for the public to have an opportunity to make its voice known, whether collectively or not so collectively in certain circumstances, the issue we are concerned with is that that be heard and that there is evidence which is clear that that is taken into consideration in whatever goes forward.

Whether there should be a framework in which there are continuous open hearings where people can come and make their voices heard I think depends on how much accessibility and time there is using the already established processes. I am not sure that we are experts in that. I think when the public feels that— I know when we feel that there is an opportunity for our voice to be heard in the regular way, if I can put it that way, and that when it is

Dr. Donner

C-1750-2

45

April 13, 1988

heard, if decisions and revisions of decisions need to be made, that happens, or when it does not happen, we understand as citizens why not, then we do not feel the need to have continuous ongoing committees and select groups studying various issues.

I realize that does not answer your question about the framework. I think our concern is that "meaningful" is as the outcome suggests. We have some question in relation to the accord around how meaningful, ^,

C-1755 follows





~~I think our concern is that "meaningful" is as the outcome suggests. We have some question in relation to the accord around how meaningful really was the process in terms of how much was heard and how did the signing happen, etc.~~

Mr. Offer: If I could just ask one further question? I would like to ask a question with respect to your presentation surrounding access to future shared-cost programs. I think it is extremely important, especially from an association such as yourselves.

You are without doubt well aware of the amendment in section 106 of the accord. I would like to hear from you and certainly from your perspective that the framework set out in section 106 gives, first, the constitutional entrenchment of the federal government to enter into cost-share programs in areas of exclusive provincial jurisdiction, and second, it gives the province a flexibility that was not there before, a flexibility to opt out with compensation in order to address those needs contained in this shared-cost program in a way that is very sensitive and characteristic of that province.

I think you will know that not only are all the provinces very different in terms of what services are needed and how they are delivered, but probably also within the province there are areas where services are delivered in a very different way. My question to you is whether section 106 does provide a very necessary and meaningful flexibility and opportunity for provinces and associations like yourselves to make certain that whatever the program is, it be delivered in a manner that is very sensitive to the particular province.

Ms. Ross: I guess I could begin. It is one thing to say sensitive to the individual needs of a province, but our concern— For example, take senior citizens. We are saying that we have health care and that we are providing home care services for seniors and that is part of our health care system. If a province decides that basically, to meet its objectives, it can provide mothers' assistance or something, they are still meeting maybe the objectives, but the standard of universality and offering to seniors in any part of Canada portability, if someone moved from British Columbia to Ontario or whatever the case may be, we are leaving that open. That is where our concern is, around that gap that can be created.

That is why we address the standards and bringing in universality and the portability and so on. If it is left to the individual provinces, that is exactly our concern, that there will be groups and gaps in different provinces. It is one thing to address what one sees, but there is also then the minority group, perhaps seniors in a young province, who would not be served. We cannot accept that in health care and the universality.

Mr. Offer: I understand exactly what you are saying, except that section 106 talks about areas that are within exclusive provincial jurisdiction, not matters of federal jurisdiction where that particular example might have carried more weight. It is only within the purview of the province.

Dr. Donner: Having participated in fighting the Canada Health Act issue, I can tell you that we are just not prepared to let it go at that. When one reads it, it looks very good superficially. It protects the national— For us, the concern is health care as one, but it might be other national cost-share programs. It protects the health care system, the Canadian system.

Dr. Donnet

C-1755-2

47

April 13, 1988

However, the health care system is administered provincially and our concern would be those five principles, unless it is clear that those standards and the criteria in terms of what goes into the national objectives are part of...

C-1800 follows



(Dr. Donner)

~~... our concern would be that those five principles, unless that is clear that these standards and the criteria in terms of what goes into the national objectives are part of what you could and could not opt out on leaves it too weak. We are a voluntary organization. We have members all across the province. We have some provincial objectives, for example, around health care reform. It could be that in some regions, that is not the number-one priority. However, some places there are issues of such vital concern to the health—I use that in the broadest sense of the word—of Canadians that we are not prepared to allow, quite frankly, for that flexibility.~~

1800

I would use other words, perhaps, than "flexibility," but I think when it comes to health care, and a very difficult battle having been won to provide a very fine national health care system, it is not enough to say, "As long as you meet the objectives of the national health care system, then if you have to make some adjustments provincially, that is OK." We are not convinced that some of those differences—some of that flexibility would not, in fact, erode the system, and I think that is from our perspective just plain not acceptable, I appreciate what you are saying around flexibility.

Mr. Offer: It seems to me that what you are saying is that you are concerned about giving the province the flexibility even within its area of jurisdiction, which is not, of course, Meech Lake, but it is probably something in 1867—

Dr. Donner: Oh, I think it is.

Ms. Dick: I do not know that there is anything that is absolutely exclusively provincial or federal jurisdiction in terms of the practice of the Canadian Constitution. If we go by the letter of the law, perhaps, but that has not been our Canadian experience. Long ago, the provinces decided to band together with the federal government so that we would have a national health care system that had standards. If we go ahead with the Meech Lake accord, it would be very difficult to recover and to have future cost-shared programs which will have to change to meet the changing needs of Canadians.

As an example, in the wording of the accord, a province could be compensated for having an initiative. We already have initiatives. There are many initiatives that are under way in this province right now. The flexibility is already there. The standards are broad enough and the criteria broad enough that it is very easy to meet the needs of individual citizens and communities with the existing standards. We could be on the road back to what we had prior to medicare which would be putting Canadians at risk for having to pay for programs and care. I think it is a very serious matter. It is very risky, and I would urge you not to go ahead with this accord, framework or no framework, for future processes. I believe this matter has to be settled before there is any discussion of framework.

Mr. Offer: I appreciate your concerns with respect to 106. I have been asking a number of people coming before the committee that same type of question in trying to flush out from their perspective the potential impact and to the people of a country and the people of the province and the services rendered by the province and by the federal government. I appreciate very much



Mr. Offer

C-1800-2


49

April 13, 1988

your response. It is something which is surely going to have to be kept in mind when we are deliberating this matter.

Mr. McGuinty: Mr. Offer, I think covered the points I wanted to deal with. I want to commend the nurses' association. I think I mentioned the other day that I have been speaking to a nurse daily for 31 years, and one point I have often made is that the nursing profession has not been sufficiently assertive. Then I come to Queen's Park and I find them before the social committee. I go to lunch today and I find Dr. ??Scully commending them for their fine contribution and I sit in on the select committee on constitutional reform and see a very fine brief reflecting not only the narrow self-interested nurses but something that goes far beyond that. I am most impressed and am very—

C1805 follows



(Mr. McGuinty)

~~was but something that goes far beyond that~~ I am most impressed and am anxious to get this good news back to Ottawa to my nursing friend.

There is one minor question—I feel this brings me back to my old academic days when you went to a thesis defence and you always had to ask the question just to illustrate you had read the thesis. On page 5: "The notion of a companion resolution recently suggested by some members of this committee is unacceptable. This action would address only process not substance." I am not sure if that is quite accurate. As I understand a companion resolution, it might deal with and reflect a concern a concern about women's rights as within the accord or the native rights or the rights of the English minority in Quebec or the French rights outside Quebec. The companion resolution is not just process, as I understand it.

Ms. Ross: Perhaps I will let Diana answer this.

Ms. Dick: We understood that the intent would have been to ratify the accord and accompany it with a resolution. This statement refers to the substance of the existing accord that would not be affected, and that is our concern.

Mr. McGuinty: Oh, I see what you mean. All right. Thank you.

Mr. Chairman: On that last point, we have heard from different groups and have in our discussion raised different possibilities as we have looked at this, but we certainly have not made any decision whatsoever but really are trying to explore a number of things. We appreciate your comments on that.

This is probably just a closing thought—I was trying to take us to the closing question or thought—but maybe I can get your reaction to it. Because we are dealing here with the Constitution and we are dealing with a specific amendment to it, I think we also have to remember that whether this goes forward or not, there is still a political process in this country that involves legislatures and the House of Commons and the Senate and that even if we were to, let us say, do all of this and those changes came about, clearly there are ways in which individual governments can still stymie different kinds of change that we would like to see. I think whatever we do constitutionally, we always have to remember there is a need for political will, be it at Queen's Park, in Ottawa, Quebec City or wherever.

To take the current example that we are often discussing, child care, and the criticisms of the proposed federal program, it seems to me that a different government with a different kind of will would pursue that differently and likely end up with a different result. I would certainly agree that constitutions are important and what we put in them are important, but even that being said, we all know we will have the Charter of Rights and we hope that that works the way we intend it to work. Yet we know that that by itself is not going to eliminate all of the equality problems we have in the country.

Whether it is over the last four or five years—I suppose because we have been into so much constitution-making and constitution discussion, somehow, and I think it has been clear in our hearings, a number of groups,

Mr. Chairman

C-1805-2

51

April 13, 1988

minority groups or however you want to describe them, who have a real problem with the credibility of the political process, have perhaps a lack of faith in that process in terms of what it is that legislative bodies have done. Clearly the charter is one answer to that and one can understand—and I think it has been made very clear to us why you feel so strongly about the charter and why other women's groups in particular felt strongly about that, as have organizations before us, organizations of the disabled, linguistic minorities and so on, because it is a means of protecting over and above the whim of an individual legislature. By the same token, I think we have to remember that we still have to keep driving and making changes. Maybe in part that will be the increasing number of women in those various legislative bodies.

C1810 follows





~~.. by the same token I think we have to remember that we still have to keep driving and making changes, and maybe in part that will be the increasing number of women in these various legislative bodies.~~ Certainly within our own Legislature we have 20 women here, whereas before much less. Within our own caucus we now have 16. I can remember when we would have one or none. That does have an impact and does make a difference.

1810

I am not by any means saying that the Constitution is not important. Whether it is the lateness of the day, I just felt compelled to say we still have to ensure that our political process works more effectively so that, as I think you were saying, it may well be that in the normal interaction that your own organization has with the provincial government, for example, that works in a way where your concerns about a variety of issues and topics are much more clearly understood because that process works more effectively. I think that is one message we have to play back in our own report, that sense so many have out there that process is not working effectively.

Dr. Donner: If I might, I think what you are saying is very real in the sense that we live in a real world and as nurses we deal with matters of political will quite frequently. The lives of nurses are not unlike the lives of women. As a matter of fact, there are many parallels in the women's movement to the nurse's movement. We appeared before the ??standing committee on social development a few days ago and talked about legislative changes we felt were important.

If just on a personal note, I could tell you something that has become a little watchword for me. The time for securing our place by invitation is gone. We want our place by legislation. I think that is some of the up and down that is a reality for nurses in the health care system and in society as a whole, and some of the reality for women. So while I can say that we appreciate the reality of what you are saying, I think we also feel an urgency around the Constitution and the accord and more certainty around the future. So it is not to say I do not, or we do not, understand what you are saying, but to say we are moving to step two now, or step five, or wherever it is. I am not sure.

Mr. Chairman: I appreciate that and my intent is not to say that is not correct. I think what has been interesting for me as a member of the committee is how this process that we have gone through over the last three months has underlined a credibility problem with our existing political process. There has been a consciousness-raising, if you like, which I suppose I sort of was aware of, but which has become much clearer as we have gone through; a lot of that relating back to the Charter of Rights and Freedoms and the sense of protection that charter has given in a number of areas and which now people feel is threatened at the very least.

I want to thank you very much for coming late in the day to the committee. We appreciate very much your brief and your answers to our questions. We have been at this for a while and we still have some time to go, but I think it is important to say that the decision you made to come to present your views is important and I trust that when we finish our work and our deliberations and come up with our report you will feel that it was worthwhile.

Ms. Ross: Thank you. We urge you not to give up and to go forward because we see turmoil in the future to be more than it is today if you carry on.

Mr. Chairman: Thank you very much. The committee will now go in camera.

The committee adjourned at 6:15 p.m.







CAGON

XCA

-87C52

C-25a

(Printed as C-25)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 27, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Cunningham, Dianne E. (London North PC) for Mr. Eves

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Afro Canadian Congress:

Espinet, Thora, President

Individual Presentations:

Mountain, Howard R. J.

Mountain, Elizabeth

Watts, Dr. Ronald L., Professor of Political Studies, Queen's University

LEGISLATIVE ASSEMBLY OF ONTARIO  
SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Tuesday, April 27, 1988

The committee met at 9:50 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

The Vice-Chairman: I will bring to order today's hearings with respect to the select committee on constitutional reform. Our first presentation today is from the Afro Canadian Congress. Thora Espinet, who is president, is here. I would like to welcome her this morning. Our usual procedure is for you to give your presentation and, thereafter, there may be some questions. Welcome. I apologize for starting late. Other members will be joining us from time to time.

AFRO CANADIAN CONGRESS

Mrs. Espinet: Fine. I must also apologize for this typing. It is not the world's best, but I was in a hurry. I am here on behalf of the Afro Canadian Congress. The Afro Canadian Congress is a black lobby group and the objective of that group is to promote equal participation for blacks in the Canadian community.

The Afro Canadian Congress is pleased to have the opportunity to inform members of this committee of our concerns with regard to the Meech Lake accord. We are concerned about the possible results of an accord which ignores the history and struggle for equal rights by black people in this country. In fact, it can be said that Canadians have ignored our rights for almost 400 years. In part, this situation is a result of ignorance, but it is more than that. The depressed condition of blacks in Canada is a result of bigotry, discrimination and exploitation by the majority of the white population in this country.

Since few Canadians are aware of the presence and contributions of blacks, we will take this opportunity to provide a brief history of blacks in Canada. First, it is important to be aware of the historical fact that the first black, a young black slave, arrived in this country in 1608. He was brought to Canada by European colonists who were struggling to gain a foothold and open the continent for exploration and exploitation of its riches.

However, slavery was not a very profitable enterprise and the geographical and climatic conditions in Canada were unfavourable for the profitable utilization of large numbers of slaves. Thus, the small number of slaves who were brought to Canada were frequently used as servants of the more wealthy citizens of the country. Many Canadians would be shocked to learn that records exist of slaves being bought and sold in Canada as any other commodity. It was not until 1834, with the passage of an act by the British Parliament, that slavery was finally abolished throughout the British Empire.

Waves of migration: There were, however, three periods of rapid expansion of blacks in Canada. Beginning in 1782 on the termination of the American War of Independence, there was large-scale migration of blacks to Canada with their Loyalist masters. Most settled in southern Ontario and in



the Maritimes. Several hundred free blacks as well as former slaves were promised land by the British in recognition of the fact that these men had served in the British army during that war. It is estimated that more than 2,000 of these settled in Nova Scotia alone.

However, they were allotted very small parcels of infertile, unsuitable land for farming. In addition, they had to await the granting of land to the white Loyalists before their turn came. The result was that the black settlers in the Maritimes found themselves in a condition of abject poverty. Isolated, poor and the victims of racial hostility, they were quick to seize upon the opportunity to leave the country and return to Africa, the land of their forefathers. Approximately 1,200 left Canada and journeyed to Sierra Leone, West Africa in 1796.

The second wave of blacks to Canada arrived as a result of the War of 1812. Again, blacks who fought on the side of the British were promised land and freedom in Canada in recognition of their services to the Empire. Again, they were disappointed. According to historians' records, more than 2,000 of these ex-slaves arrived in Nova Scotia and New Brunswick. Many others entered southwestern Ontario.

As one historian noted, "They could not have arrived at a worse time," particularly in Nova Scotia. A severe winter, poor farming and a poor harvest resulted in near starvation for many. Increasing unemployment led to hostility against blacks by the white population, a situation not unlike the attitude of many Canadians today. Racism became a destructive force, with increasing degrees of prejudice and discrimination against the black population.

The third and largest migration of blacks to Canada occurred between approximately 1820 and 1865, the period leading up to the American Civil War. Again, Canada received thousands of escaping slaves from the United States through the so-called Underground Railroad, a process whereby many white Americans helped slaves to escape by hiding them from their masters and guiding them to the Canadian border. It is estimated that approximately 40,000 to 50,000 slaves from the United States made their way to Canada and to freedom.

This time most of the escaping slaves made their way to southern Ontario where they received a mixed welcome. Most settled in areas near Windsor, Chatham, Buxton, the Niagara Peninsula and as far east as Kingston. In Ontario they found that the land was better, the people generally more friendly; however, their welcome was not uniform. Some Canadians were not happy about having large numbers of blacks living in their communities. Many blacks lived in all-black communities, the remnants still remaining in various sections of southern Ontario. One historian noted that blacks were "welcomed in Canada while they were escaping slavery in the United States. They were no longer welcomed when slavery was abolished in that country."

The increasing hostility led to a large outmigration following the close of the Civil War. Several thousand blacks returned to the United States where they felt more at home, though they recognized that the ending of slavery would not necessarily bring real freedom from prejudice and discrimination. The result of this migration was that the black population was greatly reduced.

Nevertheless, blacks who remained in Canada, and particularly in southern Ontario and the Maritimes, began to face increasing hostility and discrimination. Restaurants and other places of public accommodation were not open to them. Segregation and discrimination based on colour became

widespread. Segregated schools were established when white parents objected to their children attending schools with black children. Employment opportunities were closed to them and racial antagonism increased. By the end of the 19th century, segregation in Canada, as in the United States, had become a firmly rooted social institution.

### 1000

The 20th century: The early part of the 20th century brought little change in the position of blacks in Canada. Even in the First World War, blacks were told that they were not wanted or that they would be permitted to serve in segregated units in the Canadian Armed Forces. The situation remained virtually the same until the Second World War. It was not until the post-war period that blacks, having fought to destroy fascism in Europe, began to demand freedom here at home.

By the end of the 1950s, the demand was becoming irresistible and it became necessary for the government to respond, at least in a limited manner. First in Ontario and later in other provinces, governments began to enact laws prohibiting discrimination in employment. Later, laws prohibiting discrimination in housing were enacted. By the early 1960s, Ontario established the first human rights legislation in Canada. Other provinces subsequently followed the Ontario model.

However, it seems clear today that human rights codes and commissions and the more recent municipal actions in setting up race and ethnic committees have had little impact on the negative aspects of race relations in Canada. Discrimination, although in more subtle forms, still exists. Blacks and other racial and ethnic minorities are largely barred from meaningful participation in the major economic, social and political institutions in Canada. The pattern of isolation, poverty and hopelessness which existed in great numbers 200 years ago still exists in much the same form. Black children still find opportunities closed to them. As a result, they drop out of school in great numbers. They drop out of school because they have no faith in the future.

In 1982, the Charter of Rights and Freedoms was viewed by many as a major step forward. It was recognized, based on long experience, that laws and constitutions are no cure at all; but the charter was seen by many as an important tool which had great potential in the struggle for equality and freedom in Canada.

Provisions of the Meech Lake accord limiting the powers of the federal government and increasing the powers of the provinces arouse great concern. As badly flawed as the record of the federal government has been in the past, it is still more important to minorities than to be left to the tender mercies of many provincial governments. This is an important reason why we are here today.

The effect of section 1 of the Meech Lake accord on section 15 of the charter is of grave concern to us. Clause 2(1)(a) recognizes "that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada."

Clause 2(1)(b) states "the recognition that Quebec constitutes within Canada a distinct society." Further, subsection 2(2) states, "The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada..."



Section 15 of the Charter of Rights and Freedoms states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex," etc.

Section 15(2) allows the government to develop "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, region, sex," etc.

These two sections are clearly in conflict. Subsection 2(1) calls upon the courts of Canada to interpret the Constitution in a manner consistent with clauses 2(1)(a) and 2(1)(b). The history of blacks in this country leaves no question which section will gain prominence in a challenge between section 2 and section 15.

What the Meech Lake accord has done is legislate discrimination against those people in this country who do not fall into the two categories set out in the Meech Lake accord. Blacks are English-speaking and French-speaking. Blacks have been here for 400 years. The native people have been here before the English, the French and the blacks. Yet nowhere in the accord, which we are told is important to the unity of Canada, are these people recognized.

What is fundamental about the Meech Lake accord is the single-mindedness with which all the politicians have disregarded the existence and contributions of those members of the Canadian society who do not fall into the two categories set out in Meech Lake. What is also fundamental is that most of the politicians who now tell us how great Meech Lake is for Canadian unity are either Anglo-Saxons or French.

The Meech Lake accord has a far-reaching effect in terms of any programs which affect the non-English, non-French residents of this country. For example, in terms of employment equity, could a government which has committed itself to employment equity for visible minorities now make the same programs language-based in order to promote and preserve the fundamental characteristic of Canada? This would severely affect blacks and other visible minorities who are underrepresented in the workplace.

Several ethnic groups have been lobbying the government to fund heritage language programs. Could the government not now legally under section 2 refuse to fund these programs, as they do not comply with what is required in section 2?

Recently, we have seen an influx of visible minority immigrants into Canada. Can a government, in order to protect and promote, now legally legislate to prevent these persons entering Canada? After all, under Meech Lake, Canada must preserve its fundamental characteristic.

There are several other examples, but this presentation is too short to tell them all. What is important to note, however, is that any challenge under section 15 can easily be met with a defence under section 2 of Meech Lake and, consequently, the disadvantaged individual or group would not succeed.

There is only one way to prevent the disastrous effect of Meech Lake and it is to amend section 2 to recognize all Canadians. Unless this is done, any challenge could be met by the government with section 2.

The government has not been clear on the effects of Meech Lake on the



groups not specified in section 2. We, however, hear on the news that it will not affect the rights we now have. Promises and assurances by politicians are of no effect. What we must have is a clear, unambiguous amendment to section 2 of the accord to ensure that the guarantees under the charter are not weakened or removed.

In order to alleviate the concerns we have expressed here today, it is suggested that section 16 be amended to include section 15 of the charter.

The Vice-Chairman: Thank you very much for your presentation and, in particular, the last little bit where you set out exactly what you think would be appropriate to meet your particular concern. As I indicated to you just prior to our commencement, we have heard from many people and each time there is a different slant, a different point of view. I am particularly pleased to have you here today because, in my recollection, this is the first black presentation we have had. Your comments here today and the background you have given have been very helpful. We will have a time for questions and will start with Mr. Allen.

Mr. Allen: Thank you. I am delighted the Afro Canadian Congress has come before us. I apologize that other members are not here. Having been absent the occasional early part of a morning because of traffic problems, etc., I think there may well be good reasons why my colleagues are not here to listen to you, but I want to assure you, first of all, that your remarks are on record. We do look at the transcripts when we miss sessions, and that will all be taken into account as we come to a conclusion on these hearings and draw up our report. You should not feel that your remarks have any less force because there are only two of us here and not more of us.

1010

Second, I am especially pleased that you introduced your remarks with a short capsule history of the blacks in Canada and in Ontario. You are on the air, as we are, and people are watching and not many of us know that history, even in the short form, and so I am pleased that you gave us that account.

I want to come close to the centre of your concerns. Obviously, the relationship between the charter and this accord is a very complicated matter, as we have had lots of opportunity to discover. What I would like you to explain a little bit more for me is your concern, first of all, about how subsections 1 and 2 of section 15 in the charter are in conflict, because I would have thought that while there is a conflict in the sense that affirmative action programs, for example, for blacks might well mean that other people such as myself might feel we were not getting enough attention in the marketplace or wherever, we would understand that would be to make up for a major disadvantage that the visible minority, or in another case a handicapped person, might have.

If you agree with affirmative action programs to make up those differences, those are a way of overcoming discrimination. Then I am not sure what the conflict is that you are talking about between sections 2 and 1 which affirms the general opposition and equality rights, for example, with regard to handicap, race, sex and what have you. What is the conflict?

Mrs. Espinet: The conflict in the Meech Lake accord is that it would appear here that the groups that have prominence--this is what it says here--are the French-speaking and the English-speaking Canadians. Consequently, I do see that if we put those two sections together and if we

had a challenge under section 15, if I applied for a job now and somebody said to me, "Well, I am sorry, but we cannot give that job to you because we have to make up the number of French people that we have in here." The fact that there are more English people there, and this is not a sort of attack on the French, but I think the French would be the group they could easily be met with.

They could easily say to you, "Well, now we have to try and build up"--because it says "to promote" here, and the French have been behind, so what would happen is that you would find a government which has an affirmative action program say now, "Instead of concentrating on these groups--these are disadvantaged groups--then we can concentrate on the French group instead." As this is written, I think that any challenge under that could be easily met with this, because the courts are also asked to interpret Meech Lake in such a way as to preserve the fundamental characteristic of Canada. That fundamental characteristic of Canada is language duality. Consequently, any other thing would become secondary to that.

Mr. Allen: I misunderstood your point on page 6. I thought that you were comparing subsections 1 and 2 under section 15 that had to do with the affirmative action programs. You are talking about subsection 2(1) in the accord which refers to the distinct society.

Mrs. Espinet: Yes.

Mr. Allen: OK. I understand that point. My next question is, why do you conclude that language duality as a fundamental--just a fundamental characteristic, not the fundamental characteristic of Canada--characteristic would take precedence in the courts over section 15 of the charter. One can speculate about lots of scenarios, but why would you conclude that part of the accord would take precedence over the charter and especially the section 15 equality rights?

Mrs. Espinet: Because there is a section here that says that this accord should be interpreted in a manner that preserves the fundamental characteristics of Canada. "The role of the legislature and the government of Quebec to preserve and promote the distinct identity of Quebec referred to...." on page 1 is affirmed. "The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristics of Canada referred to in paragraph (1)(a), is affirmed."

It would seem to me that, if a court had a challenge under section 15, it could go back to this and say, "Well, this is what we are here to protect." I think that, because it is not clear to us, this gives a great concern to us. I note that, in section 16, it says that "Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section..." whatever.

To me, when you put those two sections together, the fact that section 15 is not included in that group, even if we could say multicultural--this section refers to multicultural and aboriginal rights--are protected. Because those sections are not there, it would seem to me that any interpretation would be that the "rights" clause in section 15 would have a secondary effect.

Mr. Allen: Why would you assume that when section 2, about the "distinct society" is declared to be an interpretive clause, whereas subsection 15(1) in the charter is a substantial, declaratory statement of



right? It does not say the Constitution shall be interpreted in a manner such as--it says, just baldly and clearly, that "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law..." Even more than that, in subsection 15(2), if you, in fact, are a disadvantaged group, you have a right to affirmative action programs, without challenge, under subsection 15(1).

Mrs. Espinet: Yes.

Mr. Allen: That is a straight declaration and that does not, in the courts, have the same standing; that to me, has a stronger standing before the courts than a mere interpretive clause.

But then, if you take the rest of the accord, you have built on to that kind of protection, with that kind of a substantial right in the charter, you have the fact that, under the immigration section, the charter is affirmed and that federal standards will apply. You have also the fact that, under section 16--which I think was a misguided section in some respects, but none the less, it does refer back to the enhancement of multicultural rights in the Constitution--under the charter, it would again strengthen your case as visible minorities among the cultural groups in Canada.

I still do not quite understand why you sense that those are not sufficient protections, with respect to the "distinct society" clause, which is largely an interpretive clause, although I think, with a little bit of substantive power added.

Mrs. Espinet: I think there is a lot of power to that because, if the accord has something to protect, and that thing to protect will be these particular groups, even in section 16, if there were something in there that talks about maintaining section 15--I think the concerns that we have, in the black community, and I think there are some other groups who also have concerns, would be alleviated--but there is nothing in there that says that nothing in this accord takes away any rights that are given under section 15.

As the black community now stands, and several other groups, in section 15, we felt was the most important piece of legislation that was made in Canada because we felt that, if it were used by the governments, then we could get something. At this time, we are a bit concerned, and I can see how--you know, I hope you will understand why we are concerned, because nobody is really telling us why, telling us how we will be affected, although I would say that just telling how we will be affected is not going to be of political use.

We want to have something written that, at least, alleviates the concerns that we have that these two sections are not going to be in conflict.

Mr. Allen: Thank you very much.

1020

The Vice-Chairman: Any further questions? Thank you very much for your comments. If I might ask one question, you are suggesting then that section 16 in the accord be amended, just to include section 15? Is that your position? I want to be sure. That is what your last paragraph says.

Mrs. Espinet: Yes, because if that is included, then we will know that the equality rights would be on the same standing as all the other



rights. Without it there now, just as a matter of straight interpretation one would say that since it is not set out there then that is excluded, and I think that is very important. It is very important to us, anyway.

The Vice-Chairman: The reason I ask with respect to that is that other groups have suggested the whole charter be included in section 16 as well, to make sure the accord does not in any way impact upon any part of the charter itself. I just wanted to hear your comments with respect to that.

Mrs. Espinet: That might well be so, but I think what we focused on today was the part that we felt affected us most. There is another section that also affects us, and that is the immigration clause--that affects us--but I see that section 15 is really, really crucial in terms of any type of equality in this country and alleviating the type of problems that the history I have outlined has set up in this country.

The Vice-Chairman: Thank you very much for making that clear, because you have come to us and you have put forward very forcefully your major concern. From what you have just said you have other concerns as well, but you would like us to focus, and you have focused, on behalf of the Afro Canadian Congress, upon what you think to be the most important part.

We appreciate your coming today, and as I said before, the information you have given us is from a certain point of view we have not heard before. As indicated by Mr. Allen, this is all part of the record and I can assure you it will be talked about as we go through and attempt to come up with our report.

Thank you very much for coming today.

Mrs. Espinet: Thank you very much for having me.

The Vice-Chairman: Our second presentation today is from Howard Mountain and Elizabeth Mountain. Would you come forward? Just have a seat there, please.

Welcome. Mr. Mountain, will you be making the presentation or will both of you be making the presentation? Whoever is going to be doing so, would you please start?

HOWARD MOUNTAIN AND ELIZABETH MOUNTAIN

Mr. Mountain: That is a very unpredictable situation, I am afraid, Madam Chairman. One of the things I have discovered about women in general, and I am sure you are included, is that part of their charm is that they are unpredictable. The one who sits beside me is no less in that category than anyone I have ever known.

The Vice-Chairman: We look forward to hearing the presentation.

Mr. Mountain: Whatever she says or decides to say, I am sure, will be more a surprise to me than anyone, but quite appropriate none the less.

The Vice-Chairman: Thank you very much, Mr. Mountain. Please proceed.

Mr. Mountain: Thank you very much.

The Vice-Chairman: I believe we have a copy of your original submission, and I understand that you are going to elaborate on that further today.

Mr. Mountain: Yes, I hope to.

First of all, I would like to thank you for allowing us to come here today. What we have to say is probably going to be quite different from the submissions you have received so far. However, as they said in the pulpit, this is the second time of asking. On request of the government those many years ago in 1981, we went and submitted then a document which in many ways says similar things to the one we have presented to you this morning.

We hope to have the committee appreciate that the conditions have not changed, and indeed, the dilemmas of the Meech Lake accord, which we find a subject of considerable controversy throughout the country, are rather universal ones that extend not only through each of the provinces for each of the individuals but also far further across the face of the globe.

As a little introduction: Good morning, Mr. Allen. We saw each other before. For the rest of you who have not seen us before--and I think that is everyone--we are both educators, particularly in the gifted area. My wife is a psychology-English type. I am a military officer, film-maker, television person, political scientist--the whole bag of tricks.

Mr. Morin: We know each other.

Mr. Mountain: Yes, we do. My apologies.

Mr. Morin: We had our officer training together many years ago.

Mr. Mountain: Yes, right. Gilles Morin and I took officer training together. What a sober and sickly thought that is. We went through a kind of Sandhurst that I do not want to even think about.

Mr. Morin: That is right. That is right.

Mr. Mountain: Ah, wonderful. It never occurred to me. You rascal, you. You look just the same. I have not changed, myself.

May I begin by going through this, because it may present a bit of a dilemma for you. The essence of our submission is probably best explained by beginning to tell you that my master's is in political theory.

My interest, then, is how a constitution is put together, the balance between the rationals and nonrationals in that constitution and the effect that balance has on the overall conduct of the constitution within the governing capacity of the nation, appreciating the fact that a constitution is a pure contradiction in terms. On the one hand, it must cope with change, and, on the other hand, as a constitution that codifies the law, it resists it.

As content, the constitution then becomes an inhibitor to progress, an inhibitor to change. When that content is inherited from a previous constitution, where the consensus that formed it was, indeed, compounded stupidity and not distilled wisdom, then people who are in the position of Pierre Trudeau or in the position of our present Prime Minister find themselves in an enormous dilemma trying to deal with not only a situation that is specifically designed to persist in time and space, but one that also has, prior to it--and, in some cases, assumed by it--a set of circumstances that are substantially nonfunctional.

Take one thing, for instance, which is of interest to us both, but is

only a very small part of this whole dilemma. That is education. It is said that, of course, the provinces have the educational responsibility in this country by the British North America Act.

Can you imagine any industrialized country in the world trying to revise a deficit, trying to ensure educational progress, and not being able to do that on a national scale because there is still that dilemma--and codified, would you believe, for some 100 more years--of the division of the educational elements on a provincial basis, such that the people can look to their migration across the provinces and hope to find, in some other place in their country, the same opportunity that might have been awarded them in an educational institution, say in Ontario, to gain some sort of place in the world in Newfoundland? Or, the education system they have in Newfoundland might expect to find a place in the highly industrialized and much more intensively business-oriented community of Ontario?

### 1030

What this brief tries to point out--I would like to go through it for only that purpose--is that when we are dealing with the codification of a document, it originally rests on the consensus that is possible; that consensus is based on information; that information is based on learning; and that learning is based on the individual's ability and the collective ability to learn.

If we are going to consider the validity of a document that is as important as a constitution, we must therefore look not to the essence of its functionality that is the content, but to the essence of its functionality that is the process.

What I have tried to say in this very short and precise piece of paper, since you and I, and especially Gilles, do not like to read a whole lot of whale-feathers and glue, is that we must make an attempt to become a state of becoming, that change, however it is done, however haphazardly and accidentally it is now performed, simply will not suffice in this world of terror, in this world of competition, in this world of scarcity, in this world of compassion.

What I would like to do is to have you appreciate that the "becoming" refers to the process. The state, therefore, for the first time in the world that I know of as a student of political science, needs to begin to consider not simply the essence of a constitution in terms of its content, but also the essence of a constitution in terms of its process. Only those two in combination will enable you not only to choose initially those elements that are most functional in the document itself, but also then to discard those that are nonfunctional as you begin such a process as Meech Lake, without the rancour and the inefficiency in those terms that have accompanied this process.

What we are dealing with is not a fault in the content, per se, in 1867 or in 1981 or indeed in Meech Lake, but a fault in the process, because the element of consensus that was formed in order to identify the codification in this process was in itself in question.

May I direct you to *Becoming a State of Becoming*, the document we put as one of the group, please. Excuse the opening paragraph because it is my way of lightening the day. The less you understand, the more you must obey. As Gilles



will tell you, I was never one for obedience, although we were required to do a fair amount of it in uniform.

Mrs. Mountain: He has not changed.

Mr. Mountain: No.

But opposite them, understanding and responsibility form a far more productive view of social order. Please, rather than just extend yourselves to look at the micro and the macro, look at the tyranny and the stupidity that accompany family breakdown in the micro concept, and look at the macro concept of the ability of the United Nations to function officially since its inception, and appreciate that the tyranny and the stupidity which plague its halls are rampant throughout the world on the basis that consensus, wherever it is formed, does not pay attention to the process by which it is formed, but only then reserves the right to enshrine the content that is derived.

The consensus which is the foundation of democracy is a collective concept of understanding and responsibility of each individual, based on availability of valid information and the capacity to absorb it. Please note there are two separate and distinct elements that are proposed here. First is the availability of valid information and second is the capacity to absorb it.

Mr. Radwanski, in his recent piece of paper asking for some educational reform, used words we coined some time ago, "learning opportunity," and a learning opportunity is only useful if it is matched with a learning efficiency. My wife and I represent a learning system that we tried to institute originally on a nonprofit basis and now we have instituted it as a company only because that was the at arm's-length stature we had to take.

This particular approach is the one we take, the dualism of a learning opportunity and a learning efficiency. Without that dualism, learning how to harvest coconut palms in Baffin Island is not appropriate. You may have the learning efficiency but I do not think the learning opportunity exists.

As consensus is validated by repeated productive application in time and space, our temptation is to codify it to promote stability and the rewards of unified action.

Ah, what a temptation. Lead not into temptation perhaps is the better phrase because when time and space designates that this temptation should be ours and we codify a document, then perhaps only an hour later or a day later or a year later that codification needs to be destroyed and we need then to change, and yet there was a simple formula and this is that the ability to learn equals the ability to change. If the rate of change is nine out of 10 and the learning ability of the lowest common denominator of the group is two out of 10, then they are stuck with either the tyranny or the chaos which intervenes between that two and that 10.

The process by which the original consensus was delineated can only rest on the validity of its information. I think that is self-evident. I really do not think I need to say more. This information is a reflection of learning ability, not only in defining the original consensus, but in accommodation to its inevitable erosion under the pressures of change.

Not good any more. We must get rid of this part of our law. It is not good any more. But how do we get rid of it except by the cumbersome method by which even you, as political individuals, face that horrible phrase which your

enemies foist upon you, which is "political will." Then really what it is dealing mostly with in the case is the difference between the awareness you have as politicians and the opportunity or the capacity of your electorate to change at the rate at which you know that ought to happen. And so the lag is not only a lag which causes you enormous distress; it causes you to perpetuate elements within legislation that should have been abandoned many years ago.

Hence, the primary safeguard for the quality of consensus both initially and over time, is the process by which it is formulated.

A constitution is our best attempt at universal consensus, codified to form a basis to lesser laws that follow. So important this is, because as we have seen this morning and you have seen--my goodness, how many hours now?--this is the bulwark; this is the cornerstone; this is the beginning. A constitution safeguards your freedom and a constitution protects you from tyranny. Without it and without the ability to change it to conform with the elements that are out there, and change is a very large object these days, then as soon as it becomes less either in the original or in the deterioration, and the further away it gets from the reality, the less useful it is, and unfortunately, the more destructive it is.

#### 1040

Since a universal is by definition a concept that will accommodate both time and space--by definition only, notice--the most vital part of its validity must be to ensure an efficient process to accommodate change; for this same concern recognizes that its initial form--in our case 1867, the Magna Carta, how far back do you go?--will be as accurate to the moment of codification as possible.

Now the tough one, short and sweet. My mother told me write only one sentence in a paragraph if you want it to stick. It is senseless to codify the content of any consensus if you cannot at the same time codify the process.

Content is what you have learned; process is your ability to learn it. Here we are in the self-evident category again. Pardon me, please, but a precedence of logic reverses that order so that learning how to learn becomes both our primary act and our primary concern.

A constitution, by definition, is our most universal codification, coming as close as possible to establishing a consensus for "all of the people all of the time." Where have we heard that one before?

Without understanding, it is tyranny; without responsibility, it is chaos. Do you not know it, you elected officials? How about being accused of tyranny when what you are trying to do is implement order? How about being accused of chaos when all you want to do is extend freedom? All of these things are a result of the learning ability of the electorate, not only those who sit in office, but each person who must interpret these laws, this Constitution to their end, to their way.

Both understanding and responsibility come from learning, whose only basis is knowing how to learn.

My mother said to me there are two things you must do in order to succeed. One is to ask the right question. I think we have managed. I hope you will at least have consideration for how we have managed. Others--you, Mr. Allen, have an appreciation that at least we have made a hard shot at the

solution. Not only has Mr. Radwanski said how to learn ought to be a part of this province's educational system, so that the education system has a system of education--not only that--but also the original individual who began and for years served as its director--Dr. Jackson of the Ontario Institute for Studies in Education--has remarks which are available to you in a document you will be passed very shortly in which his recommendation was, years ago, that this be instituted.

Mrs. Deller, do people have these other pieces of paper?

Clerk of the Committee: Not yet.

Mr. Mountain: OK. The construct of the constitutional document as a law may seem to you to be rather far away and absurd and ethereal and the concept of learning how to learn may not have a direct or attached part of that association. \*

Would you give out, please, Justice Has a Birthday?

Perhaps you can appreciate my sense of humour once again, which I refuse to repress in this world of mediocrity and idiocy; you know, poor hamburgers and various things.

Great Scott, he's done it again. Justice has a birthday. Many happy returns. Not Sir Walter or he of the Antarctic, but General Scott--that is a military comment, please--or more rightly, Attorney General Scott.

Reason has always suffered at the hands of emotion and violence but neither of the latter could be considered a cornerstone of civilization, and given you can muster the functional literacy--By the way, may I claim something? In 1952, I was the first one who published that well-known and often vilified phrase "functional illiterate." As we get through this document--not this one, another one--I hope to clarify what that really means and not what people have been using it for in the United Nations and the federal government, on and on. We may have all found a glimmer in the dark.

The remark I refer to is the one in which we are all asked to consider the reduction of the mandatory incarceration of a first-degree murderer, from 25 years to a lesser term.

This will not appeal to the recently disappointed advocates of capital punishment, but if we can rise above the eye-for-an-eye, tooth-for-a-tooth mentality, it would seem that Mr. Scott has pointed to a better path. The eye-for-an-eye, tooth-for-a-tooth mentality is rampant these days.

Noting that after a period of 25 years behind bars, rehabilitation would be very unlikely, to say nothing of the public cost for those years, robbing from the rest of us over a million dollars, Mr. Scott suggests that with a reduction of sentence, a greater potential for rehabilitation is possible.

Some perspective emerges if we can imagine, when after conviction at 18 years of age and a 25-year stay in prison at a cost of a million dollars, at age 43 the prisoner could emerge with a potential for four more decades of mischief, murder and mayhem, then to pass on quietly at public expense after costing us all well over \$2 million to apprehend, convict and confine him for those decades. We do it.

Does that seem only expensive or simply fictitiously absurd? If so,



count the cost of all the positive contributions lost to a life of crime and how many lives destroyed or disfigured are victims to a single lawbreaker in the whirlpool created by his or her lawlessness.

An expensive cure, to be sure, but one rendered many times every day. But why civilization has followed this design for eons with such little success is not obvious to all.

Why am I reading this? Because this is one of the laws that is passed down from the Constitution and this is how it fits.

How is it that a viewpoint, a philosophy, a plan, an operation for the prevention of this dilemma has evaded our perception, let alone our purpose?

My grandmother often said to me as a child that criminals were people who never learned their lessons. Perhaps she could have spared herself the last two words: Criminals are people who have never learned.

Could it be that they never learned how to learn, and is it just possible that no one had taught them how to learn, and therefore must we conclude that no one knew how to teach them how to learn? But enough of that difficult path for the moment.

So that you do not think I am one of those cold people who deals in logic alone, please note that Mr. Scott's call may be for mercy, compassion, love, humanity, forgiveness, if that is your choice, but if not knowing how to learn sent you to jail, will any one of these exercises of generosity cure the condition?

If you have an education system with a system of education which teaches the most important subject in school, that is how to learn, all parties--victim, society and prisoner--would escape without penalty and the subsequent positive outlook and action is something we can only imagine, yet something I am sure we would all welcome.

Crime and punishment as a simple consequence of cause and effect have been the stupid binary approach to law and order that has been our curse for centuries, not only on an individual basis but a collective basis, I might add.

Now Mr. Scott has broken the chain by questioning the severity of punishment in favour of rehabilitation. Yet he is on record also to have us appreciate that restitution is also a substantial element of many awards.

Can we look forward to every judgement considering punishment as only one of its elements, restitution as the second, and finally rehabilitation, rehabilitation reflecting the forgiveness, mercy and compassion we have always been urged to extend, but now a functional possibility because there now exists a system to teach people how to learn, whose same, simple understanding administered before the fact may save us all the enormous cost in suffering and misery we all seek to abolish.

1050

Each time we lay to rest a victim, a policeman, a prison guard, a convenience store worker, a refugee or even a head of state, the reality of murder ignites such an outrage that our only response may be revenge. Revenge is only a little more futile than mercy if no design is in place to safeguard

the process of rehabilitation. That process only comes from learning, which in turn only comes from learning how to learn.

Time flies.

The Vice-Chairman: Yes, it does. May I just suggest to you that I find this extremely interesting, but I hope you can confine yourself so that we can ask you questions with respect to your opinion on Meech Lake and, in particular, your first presentation about the process, so that we can have time to ask you questions.

Mr. Mountain: Right.

The Vice-Chairman: Perhaps you could sort of tie into Meech Lake as much as you possibly can.

Mr. Mountain: OK. Allow me one more. Would you give out "First Aid," please?

The Vice-Chairman: I enjoy your sense of humour.

Mr. Mountain: Thank you very much.

The Vice-Chairman: We all do.

Mr. Mountain: I will impose it on you whether you enjoy it or not.

The Vice-Chairman: Just as long as you let me impose mine.

Mr. Mountain: Oh, indeed, yes. I have my wife's imposition daily and I could not live without it.

Sometimes if you write a book, it is no good unless someone reads it.

The Vice-Chairman: But it is not any good until you write it either.

Mr. Mountain: No, that is true.

The Vice-Chairman: That is one of the most important things.

Mr. Mountain: If you can get a book on one page, maybe it would be a good idea because maybe more people would read it.

First Aid.

How much of sickness is  
Not knowing the prevention  
Not knowing the treatment  
Not knowing the cure  
Not knowing  
Not knowing how to learn.

One more perhaps. How much money do you spend on health care? It should be spent on teaching people how to learn because there is the prevention. There is the treatment and there is the cure in a new dimension.

Deborah has more things for you. Not just now please, my dear, because I am going to stop for questions, which I hope you will find interesting. I

would commend, Mr. Allen, because of your kind and sombre face and your attention to us the last time we came to a committee, please read "Last cry--last laugh." With the chairman's sense of humour, I am sure you can sit together and enjoy it over a coffee, but do not invite Gilles.

The Vice-Chairman: Thank you very much, Mr. Mountain. I do appreciate your comments. It is a pleasure to have a private citizen come as well and to take the time and the effort to look into one of the major political situations that has ever been faced in Canada. Your comments and your original brief I found extremely interesting. Are there any particular questions anyone wishes to put? If not, I have one if I might.

You are very general in your comments with respect to just exactly what you are suggesting in the process. I liked your one paragraph, the paragraph saying that, "It is senseless to codify the content of any consensus if you cannot at the same time codify the process."

Mr. Mountain: Right.

The Vice-Chairman: May I just ask am I wrong in interpreting that you think somewhere in the Constitution there should be a process for the growth of the Constitution? Is that a fair way of putting it?

Mr. Mountain: That is one fair way of putting it.

The Vice-Chairman: OK. Do you have any other comments you would like to make?

Mr. Mountain: Yes, I do. If the submission we made in 1981 is on record and I believe I gave you--no I did not, but I will supply copies if you wish, of that submission.

The Vice-Chairman: You can supply a copy to our clerk and that would be sufficient.

Mr. Mountain: Yes, at that point in time.

There are two facets to becoming a state of becoming. The first one is learning how to learn, because it controls the quality of the consensus. Please stop me if you say, "I don't know what you're talking about."

The Vice-Chairman: I understand.

Mr. Mountain: If it controls the quality of the consensus--he is talking to me again--then that consensus is codified into law and you can then be abused or punished or assisted or confined by that law. Then surely it is your right as a citizen--in fact, it is your initial right as a citizen--to be taught how to learn, as that is the access you have to the content.

Your job as politicians, and indeed the job of academics throughout the world and of scientists, is we have all this information, but so little of it is being used. The world is so far behind its time. What I am looking at is that 97 per cent of the people in Uganda are functionally illiterate; they cannot read and write. Yesterday I heard a report that within 10 years that same 97 per cent are predicted to be dead of acquired immune deficiency syndrome. What we are looking at are the fundamental elements that enable us to learn for our own protection, for our own happiness, for our own interest



in the world, for our own growth, for our own safety. I think you all have a copy of Learning on the High Wire. Do they all?

Clerk of the Committee: Is that the brochure?

Mr. Mountain: Yes.

Clerk of the Committee: Yes.

Mr. Mountain: May I commend that to you, in terms of all the other things we missed today in the short time, and to look to Meech Lake as saying two things. First, please, please, think of the impossible task that faced those individuals and faces you because this province is a signatory to that document if it is going to mature, and appreciate the fact that in a political sense, without the kind of involvement that comes from an informed electorate, the elements of a Constitution, whether in 1867, 1981 or today, are going to be based upon nonrational elements in the first place because the consensus was a bad one, because not only in 1867--I do not want to go through the circumstances of the separation of church and state, etc., but I do want to say that in that whole pattern the ability to learn of the individuals within the nation, as well as the ability to learn of the politicians, administrators, bureaucrats and sovereigns in that case who were involved, made a consensus which makes this Meech Lake thing three generations later extremely difficult to deal with.

What I am saying in simplest terms is that two things need to happen. Knowing how to learn must be a codification in the Parliament of Canada itself and in the Constitution because the process precedes the content. I know how to carve good statutes; therefore, I carve good statutes, not the other way around. It is an initial prerequisite of Meech Lake. The difficulty is that what my dear wife and I are here to do today is to say God bless you all, you are having a wretched time. The reason you are is that you are trying to make a buggy with two wheels. It will not stand up because over here is the content and over here is the process and this little guy sitting in the seat is the personality. If you do not have that stability, I am afraid you are going to have a constant fight in trying to ensure it.

1100

First, it talks about the process of learning how to learn to initiate the constitutional dilemma and say this is not good or this is not bad. That is the balance between rationals and nonrationals that can only happen in the correct ratio when you really understand how to learn how to understand; not learn how to believe, which is quite different.

Second, after you have codified that original Constitution to your best ability in time and space, it is absolutely useless, as we have seen throughout the world, unless the people understand it, unless they appreciate it, unless they can translate it, unless they can take advantage of it. Learning how to learn is not a document or an exercise reserved for few individuals. That is the absurd part of many constitutions throughout the world.

If you codify the Constitution here and the rate of change is 10 out of 10, if there is no process to move that Constitution at the same rate as the rate of change--and that is the ability to learn not only of the Parliament and the administrators but also of every citizen, because what is not seen to

be fair is not fair--then the Constitution deteriorates in its validity and therefore incites either chaos or tyranny, one or the other.

The Vice-Chairman: Thank you. I think Mr. Allen has a comment he wishes to make.

Mr. Allen: When I was arriving this morning on the Toronto Transit Commission version of the Metro or the underground or the subway or whatever you call it, I encountered an ad which applied Kierkegaard to Crunchies.

Mr. Mountain: That is a stretch.

Mr. Allen: The Mountains have come this morning, and I listened to their becoming a state of becoming. I gather they are applying Hegel to Meech Lake and I am not sure whether they are telling us that Meech Lake is Crunchies or what it is. I am not sure whether I understand exactly what it means to say that this exercise really amounts to a carriage with two wheels. I think I get the basic point you are making, but I would like to know in quite specific ways how well the Meech Lake undertaking codifies either content or process.

There is process. Whether the process is codified in language, it is there in precedent in the way it was done. That is often the way things get codified, in our constitutional past in any case. Can you briefly indicate whether you think Meech Lake is totally irrelevant, bad, awful, whether it is indifferent, whether it has some good points or where the specifics are that are problematic for you?

Mr. Mountain: Sure. I think Meech Lake was a document in which--careful, Howard--the press of time and space almost propelled people to a need for a consensus. The propulsion led them, unfortunately, not only to make some ill-advised choices for that moment, in my opinion--because they were politically viable they could be sold in one or another part of Canada--but the difficulty in selling them in one or another part of Canada was not based irrationally. It was based on the learning ability of the individuals in those various parts of Canada and to what degree their support of Meech Lake would be rational or nonrational. Does that make sense?

I can take it one step further. I would be glad to be specific with you, but it would take some time. What I am saying also, though, is that when Meech Lake was put together, it suffered from the difficulties of 1981, the difficulties of 1867, the difficulties of the Anglo-Franco wars, the difficulties of the American incursions and pressures from the south and all of the historical elements which led to structures which are not necessarily viable, but in fact, are very destructive today not only because they interfere with the rights and freedoms of individuals living in the country, given the various subgroups that are not served by that document, but indeed what they do is penalize us all because they are a bad consensus.

That bad consensus is not seen to be bad at all in terms of many people, because they look at it in this time and space; but unless there is an accommodation to the kinds of things we have been talking about, that is, that the ability to change is part of the constitutional element--and for Heaven's sake, for politicians this is so essential. Do not nail me down, please, but if you get a province in Canada where the learning ability is three out of 10--and you can think of one, maybe; I do not know, maybe you cannot, but if

you can, try thinking about one--then its resistance to change is three out of 10.

Or if you get a province where the learning ability is on a norm, six or seven or eight out of 10, but one small area is intransigent and it is vital and it will not move from it because it cannot change it from a nonrational to a rational point of view, it is self-destructive at that point. That is the essence of what we are trying to say today in terms of putting an education system with a system of education and enlarging the whole perspective of human behaviour so that the content becomes an element of their understanding in the same way that process becomes an element of their understanding.

I know what I am doing, because I know how I did it, and once I know how I did it, I can undo it. But if I went in and did it without having the faintest idea of how I did it, I am stuck and I cannot undo it, because someone says, "You are not loyal," "You are not kind," "You are not fair," or "You are not just," and all of those things may make one dead. To me, that is stupid. Stupid is not an entity in itself; it is a measure of a person's ability to learn. No one should be criticized for not having that ability, because I only know how to fly a plane because someone taught me, and it was not you.

The Vice-Chairman: Thank you very much.

Mr. Morin: Just one question.

Mr. Mountain: I hate this. This is the worst part of the whole thing.

Mr. Morin: It is nice to see you after 37 years.

Mr. Mountain: Isn't it marvellous?

Mr. Morin: You have changed a bit. Your hair is white; mine is a bit receding.

Mr. Mountain: You are better looking, though. You really are.

Mr. Morin: I think the message you try to communicate--and tell me exactly if I understood you well--is that before you implement any laws, make sure people understand them clearly, make sure you have full participation.

Mr. Mountain: Right.

Mr. Morin: Make sure you do not sign anything unless you really understand it clearly. Do not become prisoners of your own laws. Give yourself a lot of flexibility. Make sure people participate. Make sure you get involved, that if you write a constitution which is fair, it is fair to everyone, that you take into consideration the strengths and the weaknesses of the people.

1110

Mr. Mountain Yes.

Mr. Morin: The other message I have received, and it is very clear, is do not sign it until you really know what you are getting into. You feel yourself that we are not ready for that. Am I correct?



Mr. Mountain: Yes. I agree with everything you say, Gilles, but may I add one thing more? All of those good things you talk of rest on people's ability to learn. All of those good things for politicians, all of those good things for the people rest on that single post. All the intention and all the goodwill and all the rest of it can come to naught if the learning ability of the individual or the group is not capable of absorbing the idea, even if it is in their own best interests. Elizabeth?

Mrs. Mountain: I just want to add that to this point in time learning ability has been assumed. It has been taken as a given. I think Howard is trying to make the point that to this point it has been subjective, random, intuitive, accidental and therefore can be either efficient or inefficient. What teaching people how to learn does is to objectify people to that process by a deliberate educative experience that guarantees a level of efficiency that can be projected and identified and not assumed.

The Vice-Chairman: And therefore not haphazard.

Mrs. Mountain: Not haphazard.

The Vice-Chairman: Thank you very much, both of you, for coming and for your interesting presentation. I am looking forward to reading the rest of the documents you have left with us. Again, I would like to say it has been extremely helpful to me to read what you have put forward and to listen to you answer the questions. It is certainly something that is going to be discussed when we look, in particular, at the process and what has happened before Meech Lake. Thank you both very much for coming. We really do appreciate your taking the time and the effort to be here.

Mrs. Mountain: Thank you very much.

Mr. Mountain: Thank you very much, Madam Chairman, members of the committee. Thank you very much. Special thanks to Gilles.

The Vice-Chairman: Thirty-seven years have not hurt him that much.

I would like to call on our third presentation for this morning, Professor Watts.

Mr. Mountain: Sorry, I will move my case here.

The Vice-Chairman: Do not forget your recorder.

Mr. Mountain: Oh, yes, my other mind.

The Vice-Chairman: Good morning, Professor Watts. I do apologize for being a bit late, but we appreciate your coming here today and taking time to make the presentation. As you have seen, or I am sure you are aware, we will listen to what you have to say and then we will proceed with questions. Thank you very much.

DR. RONALD L. WATTS

Dr. Watts: Thank you very much, Madam Chairman, and to the committee for the invitation to appear before you.

I have not made an individual submission to the select committee, but I was one of 11 Ontario academics who jointly made a submission to the committee, entitled Strengthening the Federation. However, I am not here as a spokesman for that group but rather in my individual capacity. I simply want the select committee to know at the outset that I endorse everything in that statement, which was sent to you in February, I believe. I am not proposing today, however, to talk about that particular written submission. I simply draw it to your attention and say that I support it wholeheartedly and everything in it. I would, of course, be happy to answer any questions, if you have questions on what is in that.

Second, I would also want to emphasize that my views have been shaped by my experience as one of the two Ontario representatives on the Pepin-Robarts commission, when I had an opportunity to travel all across Canada and hear the views of Canadians on constitutional matters, and as a consultant to Mr. Trudeau's government during the summer of intense constitutional negotiations in 1980. But here I am not a spokesman for any party or any group. I want to emphasize that what I say is in my capacity as a private citizen, albeit with perhaps some special experience as an academic and in Canadian affairs.

Since my area of primary scholarly activity has been the comparative study of federal systems, it occurred to me that it might be of most use to the committee, given the lengthy sessions you have already had, if I did not simply try to recover all you have heard, but rather looked at the issues you are addressing from a comparative context, perhaps to shed some different light that you may not yet have heard. So I am going to focus my comments on the 1987 constitutional accord, particularly in the comparative context and in relation to the experience of other federations.

While we in Canada must deal with our uniquely Canadian problems, I think too often we fail to look sufficiently at what we can learn from the experience of other federal systems. Oh, yes, we refer from time to time to the American experience, but very rarely to the relevance of, say, Switzerland, which is not a bilingual but trilingual federation, or to Australia, which followed the Canadian innovation of combining a federal system with parliamentary institutions, or to the Federal Republic of Germany, which has perhaps developed most extensively the institutionalization of intergovernmental relations, and even some of the developing federations.

I wonder how many Canadians or, for that matter, members of the committee realize that the independence constitutions of India and Malaysia were based largely on the Government of India Act of 1935, which in turn was modelled very closely on the British North America Act. Therefore, if you look at their federal constitutions, you can find a great many close parallels, and both of them are federations that involve multilingual or multiracial constituents. On a number of the issues relating to the accord, I would like to try to draw from comparative experience and suggest that these may allay some of the concerns that have been expressed by the critics of the accord.

The views on the constitutional accord seem to be in sharp variance. The critics have given the impression of the accord that, first, it represents an abdication of the federal government and a massive transfer of powers to the provinces; second, that the recognition of Quebec's distinctiveness is a first step to inevitable separation; third, that the accord will prevent any new shared-cost programs; fourth, that the rights enshrined in the Charter of Rights and Freedoms are threatened; and, fifth, that further Senate reform would be prevented. Of course, you have heard a lot of others as well, but I am picking on perhaps five of the major ones.

The supporters have taken a contrary view on each of these positions, arguing that, first, the inclusion of numerous nonderogation clauses ensures that federal powers remain basically unaltered; second, that the failure to reconcile Quebec as the one province that did not assent to the constitutional amendment of 1982 will lead inevitably to Quebec separation; third, that the federal power to engage in shared-cost programs in areas of exclusive provincial jurisdiction will be explicit in the Constitution for the first time under the accord; fourth, that the Charter of Rights, and especially those enshrining gender equality, is legally secure; and, fifth, that the accord represents an interim step towards further Senate reform.

To come clean at the outset, my own general position on the constitutional accord of 1987 is that although the accord is not in every detail precisely the way I would have wished or would have drafted, and all constitutional amendments are compromises, taken as a whole and on balance, I believe the accord will strengthen rather than weaken the Canadian federation. Indeed, that was why we chose the title Strengthening the Federation for the submission that the group of us made. That experience of other federations bears this contention out.

Furthermore, I am concerned that a rejection now of this effort to reconcile Quebec, after it has been accepted and approved by Quebec, will almost certainly, if now rejected, have harmful, long-term consequences for Canada and Quebec's position within it.

#### 1120

I would also argue as a proud Ontario citizen that my province, given the key role it has played within Confederation as a conciliator and promoter of Canadian unity in the past and as the province which contains the largest francophone community outside Quebec itself, has, I believe, a special responsibility for promoting good relations between Quebec and the rest of Canada.

When considering the accord in a comparative perspective, I propose to comment on three aspects of the accord: first, its objectives; second, the seven elements of the accord; and third, the processes by which it was arrived at.

First, the objectives: A major area of criticism has been by those who argue that the accord does not address such problems as the development of aboriginal self-government, the improvement of the Charter of Rights by removing the possibility of governmental overrides, the incorporation of fuller provisions for multiculturalism, the eventual provincial status of the northern territories and so on.

In my view, this criticism misses the point that the constitutional accord was not intended, and should not have been intended, to resolve all outstanding constitutional issues. Rather, it was designed to deal specifically with only one area, that is, the reconciliation of Quebec to the constitutional amendment of 1982.

The irony of that new Constitution of 1982 was that despite the fact that it was the rise of separatism and the Parti québécois in Quebec that made the constitutional issue a central concern in Canadian politics from 1976 to 1982, and despite Prime Minister Trudeau's promise during the referendum campaign in 1980 that a rejection of the PQ proposal for sovereignty-association would lead to a renewed federalism, the 1982



constitutional amendment was, in the end, assented to by every province but Quebec, and it was rejected by every major party within the Quebec National Assembly, including the Quebec Liberal Party. Thus, in effect, politically speaking, the 1982 Constitution was politically imposed upon Quebec.

As long as the PQ was in power, there was very little room for negotiating Quebec's voluntary assent to a renewed federalism and, therefore, this situation was understandable. The lack of Quebec's agreement could be understood. But with the election late in 1985 of Bourassa's Quebec Liberal Party, committed to negotiating Quebec's assent, the opportunity for constitutional reconciliation of Quebec occurred. Thus, the objective of the accord, publicly announced by the premiers at their Edmonton meeting in 1986 and by the Prime Minister, was to deal with this issue first and then address the other constitutional issues.

I think here we can learn a lesson from the Swiss. Instead of trying to solve all our constitutional issues in one grand amendment every time we amend the Constitution, let us look at what the Swiss do. The Swiss have tackled constitutional issues incrementally, bit by bit, in an evolutionary manner. Indeed, in the 140 years of their federal history, they have made some 88 constitutional amendments--on an average, more than one every two years. In this way, they have avoided cataclysmic political tensions over total constitutional amendment, like those Canada experienced from 1980 to 1982.

Thus, I think we should evaluate the accord in terms of its limited overt objectives, not for the things that it does not do, but for the things that it set out to do.

Furthermore, I believe the effort in the accord to make the discussions of the first ministers' conference on constitutional issues routine and incremental, as the accord proposes and as the Macdonald commission before it proposed, is a step in the right direction of the incremental adjustment of the Constitution.

Turning to the second area, the seven elements of the accord, I will look at each very briefly. The first is the recognition of the linguistic duality of Canada and of Quebec's distinctiveness. Critics have argued that this represents a special status for Quebec, and thereby establishes two Canadas, but I think we must note that this is not something new in the accord. Not only is the sociological and cultural distinctiveness of Quebec a reality, but so is its constitutional and legal distinctiveness. This is exemplified, for example, by section 94 of the British North America Act, which recognizes the original provisions of 1774 for property and civil rights in relation to Quebec and has express provision that the federal government may make uniform legislation for the other provinces in this area but not for Quebec. So even the British North America Act treated Quebec in a distinctive way.

Furthermore, I would point out that supporters have argued that the reconciliation of Quebec into the Constitution, in fact, removes the division of Canada into two nations, one which agreed to the amendment of 1982--that is, the English-speaking provinces--and one which never assented to it--that is, Quebec.

In terms of the comparative aspect, I would note here that the experience of other federations has been that recognition of diversity and distinctiveness at the state level rather than the suppression of diversity

has in the long run been a source for greater federal unity. I could go into this at some length, but simply cite Switzerland as a classic example of this.

Moreover, other scholars of comparative federalism have noted that virtually every federation in its political dynamics contains elements of asymmetry, that is, asymmetry in terms of the relative power and influence of the different units within it. Those of us from Ontario have to be conscious and sensitive of this in relation to the smaller provinces, but one can also look at the different leverage, say, that California exercises in comparison with Rhode Island within the United States; so this is not unique to Canada.

To those who fear that this provision of the accord represents a massive decentralization of power, it is worth noting that the final text, approved in Ottawa on June 3, includes a clause explicitly saying that this section of the accord does not derogate any federal jurisdiction.

To those who fear that the accord would be used to limit rights under the charter, I am not myself a constitutional lawyer or political scientist, but I have cross-examined some of my colleagues who are constitutional lawyers closely and have been assured by individuals such as Bill Lederman that that is not the case. I noted, as well, that Quebec's women's groups have, by and large, been in support of the accord rather than opposed to it.

On the second element of the accord, the proposal for shared policymaking in the field of immigration, critics have argued that this should be solely a federal responsibility for national policy, but they seem to forget that the British North America Act of 1867 defined two areas--agriculture and immigration--as areas of concurrent jurisdiction, that is, as areas of shared jurisdiction between the two levels of government. The accord retains the federal paramountcy within this area of concurrent jurisdiction.

Furthermore, all that the accord does is basically to constitutionalize what have been already working arrangements arrived at under the Cullen-Couture agreement in 1978 under Mr. Trudeau's prime ministership.

In comparative terms, I would note that our Constitution, of all the federal constitutions I have studied anywhere in the world, contains fewer areas of concurrent jurisdiction than any other. We seem to have assumed that almost everything has to be put on one side or the other, in terms at least of our constitutional documents. In practice, of course, we have found that the two levels of government have to work together. I, therefore, feel that clarifying this area of concurrent jurisdiction is not the sort of threat that some seem to think it is.

With respect to the third element in the accord, the limitation of the federal spending power, critics are concerned that this will limit future federal initiatives for shared-cost programs, such as that in health care in the past. Here again, I would note that the limits apply only to programs in areas of exclusive provincial jurisdiction.

Furthermore, since the provinces compensated when opting out must develop programs compatible with national objectives, to me, one of the pluses about the accord is that it may encourage the federal government to develop objectives more carefully than it did in the past when, for example, it established the established programs financing arrangements for post-secondary education, which happens to be another of my close interests, and thereby



abandoned any sort of federal objectives for what had previously been a shared-cost program.

1130

It is also noteworthy that for the first time, the federal spending power in areas of provincial jurisdiction would be explicit in the Constitution rather than resting merely on judicial interpretation. I find it fascinating that many of those who criticize the Meech Lake accord for its ambiguity are opposed to what it has to say about the spending power because it is made more precise and less ambiguous.

Again, looking at the comparative area, I think it is enlightening. Shared-cost programs in the United States have been the major instrument leading to the dominance of Washington over the states. Indeed, this has led many commentators to question whether the states any longer exercise legitimate, genuine, political autonomy.

By contrast, in Australia, concern with exactly these issues has led to the establishment of substantive areas of intergovernmental transfers that are unconditional in form. It is interesting that Mr. Trudeau's established programs financing followed the Australian pattern here rather than the American one.

Four, nominations by provinces for Supreme Court appointments: The critics have argued that this will produce a Supreme Court that panders to provincial interests, but it seems to me that implicit in this criticism is the assumption that the Supreme Court justices are not now impartial but lean to the federal government which appoints them.

In most federal systems, it is worth noting, it is recognized that the Supreme Court serves as the umpire between the federal and state governments, and that therefore both sides should have a role in the appointment of the umpire. In the United States, this was originally arranged through the role of their representatives in the Senate having to endorse appointments to the Supreme Court. In the Federal Republic of Germany, for example, half the members of the constitutional court are appointed by the federal government and half the members by the states. I do not want to go on cataloguing examples, but simply want to point out that comparative examples suggest that the role of the Supreme Court as an umpire should involve a provincial role in their appointment.

Some critics have commented that the proposal in the accord provides no form of conflict resolution or deadlock resolution if the provincial nominees are not acceptable to the federal government. I am not sure that such a deadlock-breaking mechanism is necessary in formal terms. The United States has no such deadlock-breaking mechanism when there is a deadlock between the Senate and the President in the appointment of Supreme Court justices and we have just seen in the last year a real series of deadlocks which ultimately got resolved as each side found it necessary to reach some mid-point of compromise.

The fifth element of the accord is the proposed constitutional amendment process that expands the number of amendments requiring unanimous agreement of the provinces. The critics say this will make constitutional amendment more difficult. This is undoubtedly true, but it is only a moderate change. It is worth noting that, under the 1982 Constitution, there was already a category requiring unanimous agreement of the provinces for amendment. This category is



slightly expanded under the accord, but the general clause requiring seven provinces representing 50 per cent of the population remains the provision for most constitutional amendments.

It is worth noting that the extension relates mainly to areas where Quebec is represented in the central institutions. Therefore, that representation could be affected without Quebec having any say. It is also worth noting that this is an area where Mr. Trudeau, in 1971 and again in 1981, offered Quebec a veto, but it was the English-speaking provinces that refused.

1130

Regarding the amendment process, it is worth noting that virtually all federations require, for those most sensitive areas involving both federal and provincial governments or federal and state governments, some process of extensive involvement of both levels. I mentioned the Swiss case of the frequency of amendment, yet if one looks at the degree of consensus required for each of those amendments, it is very extensive indeed. I could elaborate on that in detail, but to save time I will not.

Six, the interim amendment procedure for Senate appointments is one proposed in the accord by which the federal government would appoint senators from lists of provincial nominations. Critics say this will make the Senate a representative of provincial interests.

My response to this one would be that Canada is the only federation in the world that I know of where the central government appoints all the senators. In most federations, the members of the Senate are recognized primarily as representatives of particular regional interests in national affairs.

In the United States and Australia, they are elected on a state-wide basis. In the Federal Republic of Germany, the upper house consists of what we would call the state premiers and cabinet ministers. In India, the second chamber is composed of members indirectly elected by the state legislatures. In Switzerland, the choice is simply left to the cantons to decide. They can choose whatever method they wish for the election of members of the central upper house. Even Mr. Trudeau's Bill C-60 proposed that half the members of the revised House of the Federation be chosen by provincial legislatures.

I suggest that our current Senate is badly deficient in its function of representing regional interests in national affairs, at least by comparison with all other federations.

The seventh element of the accord is the proposal that the meetings of first ministers' conferences on economic and constitutional issues should be regularized. Critics argue that this would enhance the role of the premiers in national affairs at the expense of national leaders and would bypass legislatures.

My response would be that compared to other federations that combine a federal system with parliamentary institutions, we are the least institutionalized in this respect. If you compare us with Australia or the Federal Republic of Germany, Canada has fewer institutionalized meetings of the first ministers. Where you have a parliamentary system combined with federalism, the others have found it necessary to facilitate intergovernmental co-operation through regular and routine meetings. Indeed, it is worth noting

that the Macdonald commission proposed that these should be made more routine and more regular.

Finally, in relation to the accord, as to the processes by which the accord was arrived at, critics have argued that there was insufficient prior public discussion, that it was negotiated behind closed doors and that it was arrived at by only 11 men rather than the legislatures. Let me just briefly address each of these points.

First of all, in terms of prior discussion, I do not know where everybody has been on this, but the issues discussed in the constitutional accord were of course very thoroughly canvassed in the period from 1976 to 1982. Whatever one thinks of Mr. Mulroney's keeping of promises on other issues, on this he did declare openly in the 1984 election campaign the objective of a constitutional amendment to reconcile Quebec.

The Quebec Liberal Party explicitly included its five negotiating points in its platform for the 1985 election. Quebec's five points were referred to at various intervals, from the Mont-Gabriel conference in May 1986 right up to Meech Lake in 1987. The wording arrived at in the subsequent Langevin conference at Ottawa in June a year ago attempted to include some amendments and revisions in the text to take account of the comments that critics had made in the intervening month.

That is not to me a picture of a set of issues that has not been at all publicly discussed. It seems to me that the media were the ones who were caught off guard on this one, because they did not really think an agreement would arrive and therefore paid insufficient attention to these preceding deliberations of the year beforehand.

On the issue of closed discussion, I simply suggest that in most other federations where compromises have been negotiated, it has been found that only behind closed doors has it been possible to reach compromises. The great Philadelphia convention in the United States that produced the Constitution of the United States, for all that one says about American democracy, was behind closed doors.

1140

We saw for our own edification the effect of an open effort to negotiate in the first ministers' conference of September 1980, which ended in total failure, and if one wants to see the problems of getting amendments as a result of open discussion and negotiation, we need only look at the failure of the equal rights amendment proposal in the United States.

So if we want to get something that is adopted, if we want to get compromises that take account of all views without those on each side being boxed into their extreme positions, some process that allows negotiation is necessary.

Finally, on the process of ratification, for the first time in Canadian history, if the Meech Lake accord is adopted, a major constitutional amendment will have taken place, following ratification not just by Parliament but by all 10 provincial legislatures. It is worth noting that this contrasts with the 1981 kitchen deal between the federal representatives and the provincial representatives, which led to the 1982 constitutional amendment and which was subsequently debated only in Parliament, not in the provincial legislatures.

I find it ironic that if we were following the 1981-82 procedure and applied it to this accord, this committee would not be meeting. Indeed, given that all the major party leaders and the majority of each of the major national parties in Parliament have come down in favour of it, the accord would virtually be adopted right now. This accord is going through a more thorough and more careful review than any other constitutional amendment in previous Canadian history, and so I would conclude on process that, despite what the critics say, the real danger in relation to the constitutional accord is that we may talk it to death.

Let me conclude by making four fundamental points that I would like to leave with you as points of emphasis before I stop and pause for questions.

First, no constitution can avoid ambiguities. While it is right the critics should emphasize that we should avoid ambiguities as far as possible--in this respect I note that the current legal text, that is, the Langevin text has clarified many of the points made in the earlier Meech Lake accord--ultimately, any constitutional compromise requires concessions on all sides and even the occasional creative ambiguity, just as there certainly were in the constitutions approved in 1867 and 1982, and certainly in the charter itself, not to mention the United States Constitution which last year celebrated its bicentennial.

The second fundamental point I want to leave you with is that the obsession of the media with whether the federal or provincial governments have gained with respect to the other misses a fundamental point about federalism. Federalism conceived merely as a struggle between competing governments--that is, as a zero sum game where gain by one level of government is automatically lost by another level of government--is self-defeating.

As other federations I have studied indicate, to be effective, federalism involves a positive sum relationship, a partnership in which the sharing of powers by both levels of government provides mutual benefits both for national and provincial interests. In my view, the accord, as revised, would not weaken Canada but strengthen it by affirming the positive role and capacity of the federal government for meeting national objectives while allowing for provincial diversity in policy design and application.

Third, we must not confuse unity with uniformity and we must avoid the delusion that unity can be imposed by simply concentrating all significant powers in the central government. The Fortress Ottawa mentality as the solution to national unity has proved counterproductive in the past. As Daniel Elazar, a noted American scholar of federalism, has pointed out, the real strength of federations is not measured by the strength of their central governments but by the strength of the framework that holds all their governments together. Indeed, ultimately, the notion that only the central government can guarantee strength is a denial of the federal principle itself. That is, it is a preference for a unitary system, not a federal one.

The suppression of linguistic duality and of provincial and cultural diversity are not, in my view, recipes for unity but for increased resentment and alienation, whether in Quebec, the west or the Atlantic provinces. If we are to have, in the words of the Pepin-Robarts commission, a future together as a united Canada, we must learn not only to tolerate but also to cherish and glory in the diversity Canada possesses as a homeland of many peoples. If there is one lesson I have learned from examining the Swiss federal system, it



is that the overt and explicit constitutional recognition of internal diversity can itself become an extremely powerful bond of unity.

Of course, greater recognition for the aspiration of disenchanted provinces will not by itself hold Confederation together, unless at the same time we develop a wider sense of genuine participation by all groups in the destiny of Canada, a sense of shared destiny that will serve as the glue to hold us together, but in this sense the voluntary incorporation of Quebec into the Canadian Constitution represents a real advance and fulfilment of the promise of a renewed federalism, made to Quebec during the referendum campaign if separatism were rejected.

My fourth and final point is to emphasize that unity is not something that can ever be achieved once and for all, whether by the Meech Lake accord or by any other constitutional document. Like the protection of liberty, the sustaining of unity within a federation requires a constant, ongoing and continuing effort that is never completed. As our history has made clear, the task of creating and recreating Canada has never been easy, but that will be the challenge that will continue to face us, as Canadians, stretching decades ahead.

In that enterprise, I would like to close by drawing to your attention words spoken 88 years ago by that great Prime Minister of Canada, Sir Wilfrid Laurier, in an address to the Canadians of Nova Scotia. He spoke of a cathedral he had seen while visiting Britain for Queen Victoria's jubilee. He referred to it as "a marvel of Gothic architecture which the hand of genius, guided by an unerring faith, had made a harmonious whole in which granite, marble and oak were blended. This cathedral is the image of the nation I hope to see Canada become," he declared.

He continued: "As long as I live, as long as I have the power to labour in the service of my country, I shall repel the idea of changing the nature of the different elements. I want the marble to remain marble. I want the granite to remain granite. I want the oak to remain oak. I want to take all these elements and build a nation that will be foremost among the great powers of the world."

Canada will continue to evolve, and in that development I think Laurier's vision of Canada as a magnificent cathedral, building into a harmonious whole elements which continue to remain distinct, provides us all with an objective to strive for.

The constitutional accord of 1987 is, in my view, in that spirit, and if adopted will represent a step forward, albeit only one incomplete step towards that objective.

The Vice-Chairman: Thank you very much, Professor Watts. I speak on behalf of the whole committee, I am sure, in saying that your presentation gave a very brief and concise outline that you have spent many years in putting somewhere in the back of your mind, and I certainly do appreciate it. Also, your ability to put forward to us, in an understandable way, comparisons between other federations and our own is something we have not had presented to us before, and we thank you very much for that.

1150

Mr. Allen: I thought I saw some other hands that were in advance of mine, but let me begin none the less.

Professor Watts, thank you very much for coming. This is certainly one of the better, more comprehensive, reflective presentations we have had, and I am not surprised at that. You have also had your own experience in dealing with administrative systems at Queen's University--

Dr. Watts: Itself a federal one.

Mr. Allen: --a certain kind of federation, the management of which obviously has enriched your own perspective on federal systems in its own way.

Could I perhaps come first of all to the question of process? You did not defend it as a perfect process, and I want to acknowledge that. I suspect that what many people who have come to us concerned about the process have been trying to say is that out of the experience of long years of having to get unanimity in the federal House and throughout the provinces before approaching Westminster and then out of the experience on the other hand of 1981-82, which appeared to issue in an equality document that suggested that everybody would be sort of cut in on access to participation, to recognition of rights and all those things, we really expected a lot more out of the process and process change than actually happened.

I think one of the main points many have suggested is that at least some preliminary presentation of issues and response in legislative select committees, before premiers moved on to the level of consolidating a document, would have been very helpful, and that perhaps even a process of less than total commitment by the premiers which then allowed some commentary, some return to the document before they themselves consolidated their own minds, could none the less have been helpful and might have spared a lot of the reactive element that has now taken place with respect to process.

Would you comment on that. Is there a better way, and how would you construe it?

Dr. Watts: Yes. I find myself largely in agreement with what you have been saying. That is, I think first of all that one of the problems has been that what we did in 1982, which was good as far as it went, also aroused expectations which are extremely hard to realize, not just in Canada but elsewhere. I point to the example of the equal rights amendment process in the United States, which has not come to fruition and which shows how difficult it is to get consensus while getting widespread public discussion. That does not mean we should not try for it, though; I am not opposed to trying for it.

I fully agree with the desirability in future of the sorts of processes you specifically referred to; that is, having legislative select committees discuss these issues in advance. Indeed, I note that was a specific proposal of the Macdonald commission. The Macdonald commission made such a recommendation, and it is one I would have endorsed as a process that should become the norm in future. This would give Parliament and the provincial legislatures, through possibly a standing committee on intergovernmental relations or some such body--without trying to be too explicit about how each Legislature should define it or work out its own processes, some such body could discuss issues in advance and would help the Premier or Prime Minister, as the case may be, in terms of views and so on.

In terms of positions arrived at, obviously it is a delicate position. On this whole business of once you have reached a compromise, how far could you reopen an issue and so on, it seems to me when I look at the difference between the texts of the Meech Lake accord and the Langevin accord, if I can



use those two terms, it is quite significant that quite a few textual details in the Ottawa agreement show some awareness of the discussion that occurred between the two events.

I think perhaps it was a pity that other provinces did not follow the Quebec example of actually having legislative discussions between the two. That is, within Quebec, if I recall correctly, there were discussions within the legislature, within a legislative committee of the accord prior to the Langevin signing. Now of course the large majority of the members of the legislature, but not totally the Parti québécois, were in support of the accord. But none the less, it seems to me that would have been a grand opportunity for it to occur.

Now that it has not occurred, however, I would hate to see the accord thrown out simply because that did not occur. One of my great anxieties here would be, having offered a reconciliation which they themselves in the Quebec National Assembly have approved, what message do we give to Quebec if at this stage we then withdraw? I cannot think of anything that would provide better ammunition for the PQ, or whatever takes its place the next time around when separatism rears its head, and if history is any guide, there are ways in which this arises.

Next time around, if we have let this fall by the wayside, I can see the answer coming: "There is no point in trying to reach a reconciliation. In the end, they will never agree to it, so we might as well go our separate way." That is my anxiety there. So I agree with what you say about the process and share some of your criticisms of that process, but I think that having got to this stage, the greater disaster would be to fail to adopt it rather than to adopt it.

Mr. Allen: Can you tell us a little bit more about the Swiss approach to amendment? Of course, one of the elements of our present situation that makes many people nervous is that we do not have a history of being involved in successful amendment.

Dr. Watts: We did not have a process until a few years ago.

Mr. Allen: We did not have a process, and it was a long struggle, it was always traumatic and there were so many failures. Now that we are into it, but in a focused, step-by-step way, many people are nervous that this is the last shot and therefore they all want to pile in and get their particular innings at this point in time. How have the Swiss effectively avoided that and why is it they have been successful in going through their amendment process successfully, but without, I gather, this temptation always to solve every problem at that particular juncture of another amendment being in debate?

Dr. Watts: I think it is a simple thing in a way. Whether by accident or by great foresight, they adopted two amendment processes, one for what they call total revision and one for incremental revision. What has happened of course is that from time to time total revision has been proposed, but total revision which really involves a major revision has actually occurred only once, in 1874, in Switzerland. But there have been these other 88 incremental amendments.

I think in the Swiss case, at a point when there was no heat in the process, as they sat down and looked at what ought to be the amendment processes, they simply adopted two specifically, separately identified ones. I am not suggesting at this stage we could do that in terms of the formal



process, but I think that helped to create a mindset which created the notion that you do not have to have total revision every time you revise the Constitution.

Our tradition, unfortunately, is that for perfectly good historical reasons, there was an oversight in 1867 when we did not include an amendment process. The Australians learned from our experience, by the way, and did include an amendment process, even when they were a colonial federation, one which involved federal parliament approval and approval by special majorities by referendums in each of the states. Not quite our process, but they did include that.

Our problem is that through oversight in 1867 we did not include a process, and of course ever since the 1920s, up until 1982, we have been agonizing over what sort of process we should adopt. And that has made the whole issue into such a big one that I think we have it in our psyches that any constitutional amendment is a big, total enterprise. I think the routinizing of this is something we need to work at to counteract the box we have got ourselves into, a situation where every time we try to amend one little thing, everyone who is not included in that particular amendment feels, "My goodness, we're left out of it"--the aboriginal peoples, the multicultural peoples and so on.

Their concerns are important. I am not suggesting they are not important at all. But if we try to amend everything each time we amend the Constitution, I think we are doomed to failure. That is why we had such difficulty for so long getting agreement even on the patriation process.

#### 1200

I think we ought to look at an example like the Swiss, not in terms of copying the precise provision. I was interested to hear the person who appeared before me, who suggested that we have to learn to become. But part of becoming is adjusting bit by bit to changing conditions. If we had a total revision now that included all these things that we think need to be in there, it would be out of date in 10 or 15 years' time. We would have to make further revisions. We should get used to the notion that they have to be carefully done, carefully discussed, but we cannot expect each revision to cope with everything and solve all our problems. Constitutions are not that sort. They do not solve all problems for all time. That was part of my end point, to emphasize that federations evolve and a constitutional document has to be flexible and adaptive over time.

Mr. Allen: Thank you. I will yield the floor to other questioners. I just want to thank you for striking a note which I think is often slighted in journalistic discussions of our Constitution; that is, it has indeed been a rather serviceable one. One often meets with rather flighty journalistic comments about mid-Victorian plumbing and this kind of thing, that just because it originated at a certain date and time, somehow it is virtually a cast-off, along with so many other things we have put to one side in the past.

Dr. Watts: Could I be allowed to add just one comment on that? I think we have a lot to be proud of if one looks comparatively. The Americans had a civil war. Their original constitution did not solve all their problems. The Swiss had a civil war in 1848. With the current Swiss harmony, we forget that their federal system was adapted after a civil war in 1848 to cope with internal problems. The Australians had a secession movement in the 1930s, and one can catalogue the series of problems that Germany has had, from

Bismarckian times through to the Weimar Republic and so on.

If you look at the length of time the Constitution Act of Canada, 1867, to give it its current official title, has lasted and has served Canada, we have a whale of a lot to be proud of. I just want to endorse your point.

Mr. Cordiano: Let me just say from the outset I think that your presentation here today was very insightful and instructional for me, comparing various jurisdictions throughout the world to our own federalism, how they compare. I do not think we have had quite that kind of insight into other federal states. I think that is very important, because essentially, as you pointed out, perhaps members of this committee and indeed many Canadians do not really know much about other federal states and how they work. I do not think I am presumptuous when I say that.

If we really look at our own system of federalism, when critics of the accord say that this accord is decentralizing, destabilizing of the central government, the central powers, I think what they are really asking for is what you pointed out in your presentation. It is uniformity and a unitary system of government, those two things.

In fact, if you look at some of the criticisms that have been made here before us with respect to spending powers and having national programs with respect to social concerns, what most of the critics are really talking about is having a uniform program that says the same thing will have a delivery system that does the same thing throughout the country.

We know, in effect, the history of this country has been that most of these programs have evolved in various regions of the country, and in so doing, they have become more effective and have met the local needs and at one point have evolved in other parts of the country and have been adopted by other parts of the country with their own hues and differentiations among provinces with respect to how they deliver those programs. But effectively, the objective is the same thing. I do not really think we can have uniformity in the way we deliver those programs, and if we did, we would be less effective than we are now.

Stemming from that, one of the other criticisms about the accord is the fact that we have now constitutionalized a new level of government; that is, federalism by executive power, or executive federalism. Do you think that poses problems for Canada in the next decade and into the next century with respect to executive federalism? How does that square with the parliamentary process, and how does that compare internationally? I have not heard anything about that.

Dr. Watts: I will be happy to talk about that. By the way, just in passing, I agree with what you said earlier about the unity, uniformity, diversity and so on. It so happens that in a couple of weeks' time I have to give a paper at a conference at York University on Executive Federalism: The Comparative Context.

Mr. Cordiano: Good timing here.

Dr. Watts: If you are ready for 50 minutes, I will happily send you a copy when the time comes.

Joking aside, I think the point to note here is that, of course, in all governments nowadays throughout the world, by comparison with, say, 100 years



ago, the executive has become a more important aspect of government, just by the nature of policymaking and so on, but this is particularly so in those that have parliamentary institutions.

In my own riding in the past, I have often differentiated between two broad categories of federal systems. Canada was the innovator in those which are parliamentary federations. Switzerland, and before that the United States, created a federal system in which an intrinsic principle of federalism was the separation of powers within each level of government; that is, you have the President, Congress, the two houses of Congress and so on, none of which has a concentration of power. There are checks and balances among them and so on.

The Swiss system is slightly different, and I will not go into the complexities of what might be called their collegial system, but it is based also on the separation of powers--a fixed term for the executive, not responsible to the legislature and so on. That creates a whole set of relationships, and it affects the character of relations between levels of government; that is, between the executive and the legislature, the executive and different levels and so on.

Canada was the great innovator in combining a British-type parliamentary system with federal institutions. The Australians followed our example, and the Federal Republic of Germany, in the Constitution it adopted in 1949, followed our example. So did a number of the federations in the developing world--India, Malaysia, and for a time, Nigeria, but it has abandoned that now. There is a goodly number of examples in the international arena of those that have combined parliamentary institutions with federalism.

The distinctive thing about a parliamentary system, of course, is the fusion of the executive and the legislature. I do not need to tell you all this, but you will see in a moment why I emphasize this. The executive is in the legislature, responsible to it, and of course if it does not have the support of the legislature, it goes out of office, depending on what the party situation is in the House. We have had that experience in Ontario in different forms in the last couple of years, which illustrates just exactly that principle.

What is interesting is that in most--indeed, I would have to say all--of the parliamentary federations, the executive at each level has come to occupy a more dominant place within the federal system because of its prominent place within the legislature, because of the fusion of the executive and the legislature. So, by comparison with the United States or Switzerland, we find that in Canada, Australia and Germany, the executive at both levels plays a much more predominant role. This affects the character of intergovernmental relations.

It is typical of the parliamentary federations that you get the sort of situation we have in Canada where within each level of government, or within each government, there is, by some such label as ministry of intergovernmental relations, intergovernmental affairs, federal-provincial relations or what have you, a ministry as part of the government that deals with those affairs, whereas in the United States and Switzerland, with their diffused party discipline, there is a whole criss-crossing arrangement.

Indeed, for my students, I typify the difference between the American and Swiss patterns as one of marble-cake federalism in which the two levels interpenetrate each other in a criss-crossing set of relationships, and the parliamentary federation as one of layer-cake federalism in which



intergovernmental relations tend to be funnelled through the executive at each level, often through a ministry of intergovernmental relations but particularly through the head of the executive.

1210

In Australia, which I visited some years back and where I spent some time researching its federal system, there is what they call the premiers' conference, which is the equivalent of our first ministers' conference. When I sat in on it and listened to it, I could have shut my eyes, and it was just like our first ministers' conferences, including the nasty things they would say to each other and so on. In Germany, it is more institutionalized into a form of second chamber, the Bundesrat, but again there is this regular process of executive consultation.

I would say that as long as we have a parliamentary system, and I see no sign of Canadians wanting to abandon that, I think executive federalism is an inevitable outcome of the character of those institutions. For those who want to have the processes of the American congressional system while retaining a parliamentary system, you are trying to have your cake and eat it too. It is one or the other. The dynamics of these institutions are going to create those situations.

My response is that executive federalism in a parliamentary federal system is inevitable. Therefore, the task is not how you eliminate it, but how you control and harness it to ensure that the sorts of issues we were talking about are taken care of.

Mr. Cordiano: Right. That leads us to the next point about the role of legislatures.

Dr. Watts: That is right; to ensure that their role and public participation is provided for and so on. I see it as not getting rid of executive federalism but harnessing it and adapting it to those needs.

Here, interestingly enough, the Macdonald commission had some suggestions to offer. This was one of their concerns. Interestingly, the public has mainly picked up what they have had to say about free trade, but the whole third volume of the Macdonald commission report related to political institutions, and this was a point they particularly emphasized: the need to harness the processes of executive federalism to ensure a greater role for legislatures and for the public.

Mr. Cordiano: Very briefly, because I know we are running out of time, you noted that the major characteristic of Switzerland and of various other countries that have a similar federal system is a great deal of diversity, regional and perhaps cultural and linguistic. We have a similar situation in Canada. One of the interesting things that has come before us is the fact that we in this country now have a situation where we not only have a duality--we do in terms of official linguistic rights--but there is also another component, certainly another reality with respect to people of diverse backgrounds other than French and English.

I do not know if you were here earlier, but we had the Afro-Canadian group come before us, and we have had a whole plethora of people who have come before us expressing their concern about the stated policy of not only the present government but the previous governments to multiculturalism and just what that means. I am wondering from your knowledge of these other federal

states if these things have been made compatible; that is, that you have a diversity of groups within a federal state, and not only do you have regional distinctiveness, but you also have cultural distinctiveness and variety. How did all these things come together in these other federal systems and how are they given expression within a constitution?

One of the other major criticisms of the accord is this whole theory that it is a seamless web, that if you take out one part, the rest falls apart. I think you are saying that we have to approach it incrementally and that change is going to be an ongoing reality of constitution-making in the future. I think that is one of the points that has been made loud and clear in this committee's hearings process. We need to have an ongoing process. If we are going to have annual first ministers' conferences dealing with the Constitution, there has to be a process in place whereby we listen to the public and have input from them. Do you think it is possible to meld these things together in a federal state?

Dr. Watts: It is hard to answer this without sounding simplistic. The first thing I would say is that I think it is not just possible, but that it must be done; it is not just a matter of possibility. At the same time as I say that, I do not mean it is easy. It requires a whale of a lot of effort, even in a country such as Switzerland that for more than a century now has had a remarkable degree of success in that area.

Thinking back to the Pepin-Robarts commission, one of the things that struck us--we commissioned some surveys of opinion at the time and I used the quotation in my remarks--was that when you asked Canadians how they would like to typify the country in one way or another, we found that the one that far and away rang up the most support, including within Quebec, was "a homeland of many peoples." I emphasize "of many peoples."

Now the duality is important, but it is not the only element of this country. That is why I wanted to emphasize that the accord addresses one aspect, but we do not want to throw it out because it does not address every other aspect. That does not mean those other aspects are not important. I think they have to be addressed and there is no doubt about the importance of these various groups.

All right. How do we address them? That is really the heart of what you are getting at. I do not think there is a simple, easy solution. I think you have to take them one by one and work at them and it is going to vary for different groups. The needs of multicultural groups in Toronto are very different from the needs of the Inuit in the Northwest Territories, for example, but both must be met.

How these are met is going to depend upon such things as geographical concentration, location and so on. One of the reasons Quebec is a distinct society, of course, is that there is such a large concentration of French Canadians there. It is harder to deal with the position of minority groups that are spread evenly across the whole country, because you can hardly say that is the task of just one particular provincial government to deal with and so on. I think one has to differentiate between those diversities that can be dealt with distinctively by regional units and those that have to be dealt with nationally because they are the sort of minorities that are spread very evenly and are a minority everywhere.

It seems to me that the charter attempted particularly to deal with that latter category; that is, with the rights of those groups that are not a

majority in any regional unit or in any region of the country, but whose rights and whose equal treatment and so on we must, and properly, have a concern for as Canadian citizens.

Mr. Cordiano: I think the charter addressed the first step, and what we are hearing--

Dr. Watts: Oh, yes. I am not saying the charter is the be-all and end-all, but it is one attempt to address that particular area.

Mr. Cordiano: Yes.

Dr. Watts: I suppose that if there is anything I would conclude on, it would simply be to say that I do not think there are any simple, easy answers, but that does not mean we should not be working at them. We have to keep working at them and working at them. That is where I think the Swiss have been very good. They keep working at it. They do not assume that you write a document and all problems are then solved.

Mr. Cordiano: I think it is inevitable that we will have to work at it, given what we have heard in this committee and certainly what we are hearing right across the country on this issue.

Mrs. Cunningham: It is good to see you again. Once again, whenever one listens, one learns a lot, so thank you so much for making this presentation.

I suppose my questions follow along with the previous questions, and I would just like to ask a couple of specifics. One of the greatest weaknesses right now with the accord, in my opinion, is the lack of support by the public, basically because they do not understand what is happening and they have not had the benefit of listening to people like yourself. I would ask you what your recommendations would be. How do we fix something? How do we get their support? How do we gain their trust in our institutions when we have lost so much? Even though you are recommending, I think very strongly, that we have a lot more to lose if we do not pass it, what do we do about that problem, in your opinion?

1220

Dr. Watts: Again, I worry about being oversimplistic. One of the steps will be the report of your committee. That will undoubtedly receive widespread attention from the media in this province. My impression--it is just an impression; I cannot give any statistical survey--is that probably the sort of concern you are referring to is stronger in Ontario, or at least is more vocally expressed in Ontario, than it is in many of the other provinces, and particularly in the Toronto region. Therefore, it seems to me that it is a particularly important function.

I suppose all of us have a duty--that is, those who believe it will be more harmful not to adopt it than to adopt it--to express our views. That is one of the reasons why I am happy to be here or one of the reasons why just a couple of weeks ago I addressed the Canadian Club of Kingston on this subject. But it is a real problem.

One of the things that has distressed me is the degree of superficiality our media have displayed in analysing and looking at it. I am not out to clobber the media but I think that has been one of the disappointments to me



of the public discussion that has occurred. Their tendency to pitch it all in terms of federal versus provincial, Quebec versus the rest, this sort of thing--I suppose it makes much better copy to put it in terms of antagonisms, to emphasize who has not been dealt with and so on.

I suppose there is a duty incumbent on all of us who at least see the danger of the failure to adopt it to do all each of us can. That does not help you terribly much, but I do not know that there is any other simple answer.

The only way we can do it is to try to inform the public. I think there is a duty on us and that may be why so many of us in my profession at Queen's have been speaking out publicly on this. We have felt, not as partisans, that as scholars who have worked in this area, if in the light of that investigation we have come to conclusions, we owe it to the public to let people know what our conclusions are rather than to hide in our academic ivory towers commenting on the sidelines. I am under no illusions that everybody pays a lot of attention to academics or listens to them, but I think it is our responsibility.

Here I think that the role of the special joint parliamentary committee in Ottawa was important. That is why I think it is important that the legislatures have hearings and I applaud Ontario. Not every province had hearings and I applaud Ontario for having hearings and raising the issues publicly. There is no doubt about how strong the feelings can be.

I learned that when I circulated the country with the Pepin-Robarts commission, as I have jokingly said on other occasions. I was one of the eight commissioners and after we had gone around and heard what had been said in every other province, John Roberts and I used to jokingly say to each other, as the two Ontario members of that commission, "It looks as if the country is held together by a common resentment of Ontario."

I think Ontario, as a province, has a special responsibility, and obviously you and the Legislature have a special responsibility. I am not saying you can solve it all and I was not intending just to turn it back to you. I think all of us have a responsibility.

Mrs. Cunningham: I have a final question. National reconciliation being our goal, part of the media attention around Meech Lake, I agree with you, has in fact caused more divisiveness. There are people out there, women, natives and members of some of our ethnic communities, and we heard from a group today, who are feeling very much alienated.

I am thinking right now that this committee should probably be making very specific recommendations on the previous question of how we address their concerns. Perhaps it would help if we took the time to make some very specific recommendations--perhaps you would call them amendments, I do not know--with a time frame. Because if we do not, there will be a specific resentment towards whatever we do if we do not deal with that.

Dr. Watts: Could I make a suggestion here which is really, again, drawing from experience elsewhere, as it were? It is to see what the United States did when it was adopting its original Constitution. They created it behind closed doors in Philadelphia. Then they had to go out and sell it to the 13 states, as they then were, and campaign. There were the federalists, who supported it, and the antifederalists, as they were called, who opposed it, and criticisms were brought forward and so on.

Ultimately, they realized that the complicated set of institutions and compromises worked out at the convention could not be reopened without just destroying the whole thing. But what they did agree to do was to propose that the Constitution should be adopted with the agreement that immediately a group of further amendments would be proceeded with, and those are your first 10 amendments of the American Constitution, including what was their Bill of Rights, and indeed, the protection in the 10th amendment of the position of the states.

I suggest that the part that would worry me is that if we go back to try to amend the accord, the whole thing gets unravelled and so on, but I think it would be very appropriate and desirable in the process of endorsing the accord to say, "We should proceed immediately, as soon as it is adopted, with addressing this, this and this issue." It would be very appropriate for your committee, Ontario and so on to propose that, if that is in the spirit of what you had in mind.

Mrs. Cunningham: Yes, it is.

Dr. Watts: You know, there are two forms of amendment. One is to amend the accord, which opens up a can of worms, as it were, in terms of what has already been agreed upon. The other is to address immediately the problems of those groups that the accord did not try to address, that it overtly was not attempting to address. It was not that they did not think they were important; it is just that it was focused on one particular area. These others are equally important and ought to get addressed and be given a high priority.

Mrs. Cunningham: You have been most helpful. Thank you.

The Vice-Chairman: Mr. Allen, one brief last question.

Mr. Allen: I really do not want a substantial response, because I have to be in another place instantly and I know other members do, too. But the whole question of the relationship of the charter and such elements to the other, more substantive parts of the Constitution in terms of the division of powers, equality rights and legislation that might emerge through legislatures and so on has troubled us greatly. I wonder if you could tell us: Is there anything that is instructive for us out of the experience of other federations about the relationship between the charter part, the rights part of the Constitution, and the rest of the Constitution and how the courts handle that which would be helpful to us? Is there a way you could convey that to us at some point other than at this instant, because I do not think we have time to do that.

Dr. Watts: All right. On that basis, can I reflect on it and perhaps send you a note or something like that?

Mr. Allen: We would love that.

The Vice-Chairman: That would be helpful.

Dr. Watts: This is the impact of the Charter of Rights on the other. I would have to reflect on it a bit. Certainly, there is a lot of American experience in this area. Some other federations, like Australia, have yet to adopt a charter; therefore, their experience may not be relevant. But Germany has the equivalent of one and so on, so perhaps I could send you a note on that, if that is appropriate in terms of timing.

Mr. Allen: I would like that. Thank you very much.

The Vice-Chairman: Thank you very much, Professor Watts. We do appreciate your coming here today and spending the time to answer our questions and be so frank with us with respect to your answers.

Dr. Watts: Thank you for the opportunity.

The Vice-Chairman: Before we adjourn today, I wish to advise the members of the committee that the 4:30 presentation has cancelled, and as a result, we will meet in this room at 4 p.m.

The committee recessed at 12:30 p.m.



CA 2011  
252  
187052

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, APRIL 27, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Smith, David W. (Lambton L) for Mr. Elliot

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Urban Alliance on Race Relations:

Head, Dr. Wilson, President

Radford, Benjamin, Co-ordinator

Individual Presentation:

Kutney, Patrick

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 27, 1988

The committee resumed at 4:05 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: We can begin our afternoon session. Before calling our first witnesses, I would like to just note for the record and for the committee members two pieces of correspondence that I have had and that will be circulated by the clerk.

The first is from Pat Marshall at the Ad Hoc Committee of Women on the Constitution. They have sent in a letter, as well as letters from a number of other organizations who had appeared before us, with respect to the idea that was raised concerning companion resolutions. This will be circulated and form part of our record, and there will be some other letters coming in from other women's organizations which have been active with the ad hoc steering committee expressing their concerns about companion resolutions and the remedies they would like to see put forward.

The second document is a letter and attachments from the Ontario Metis and Aboriginal Association. You may recall that when they were before us, we asked them if they would provide us with their draft companion resolutions regarding a number of issues. They have done that, and that, too, will form a part of the record of our proceedings. Everyone should or will shortly have a copy of that.

I will now welcome our next witnesses from the Urban Alliance on Race Relations, Dr. Wilson Head, the president, and Benjamin Radford, who is the co-ordinator of the urban alliance. Gentlemen, we welcome you to the committee's hearing this afternoon. Our procedures are fairly informal. You may simply make your presentation and we will follow up with questions afterwards.

URBAN ALLIANCE ON RACE RELATIONS

Dr. Head: Thank you. I just want to say that we are here focusing primarily on issues which relate to race relations. We have some other concerns which we touched upon very briefly in our presentation, but the major issues we are concerned about are, of course, in the area of race relations and, to some extent, multiculturalism.

Mr. Radford is going to read our report. We do not have it quite prepared in such a way that we want to hand it to you now. We are having it typed up. It has a few mistakes in it, and we want to correct those. It will be sent to you later in the mail so that you have it. But Mr. Radford will read it now, if this is your pleasure.

Mr. Radford: Mr. Chairman, we come before you and your committee to express our misgivings regarding the Meech Lake accord put together by the Prime Minister and the 10 provincial premiers in 1987. The Urban Alliance on Race Relations is a volunteer organization of citizens of many races and



cultural backgrounds organized in 1975 as a result of a wave of violence against blacks and South Asians at that time.

The major focus of the urban alliance is to work towards the development of an atmosphere and climate in which all Canadians will work together to build a multiracial society in which individuals of every conceivable background will live, work and play together in dignity and harmony.

The urban alliance seeks to achieve this objective through research, public education and consultation with school boards, the Metropolitan Toronto Police, labour unions and other community organizations. A three-pronged approach includes research; education, including the presentation of briefs; and advocacy on behalf of the human rights of various minority groups.

Our board of 24 directors includes members from the black, Anglo-Saxon, Chinese, South Asian, Filipino and Arab communities of Metropolitan Toronto. We hope to expand our membership to include native peoples, the Korean community and other minority groups.

The urban alliance has achieved a remarkable record of success on two fronts: first, the education approach, designed to increase knowledge and understanding of the various groups who constitute Canadian society; second, activities directed towards the elimination of prejudice and discrimination against the various visible minority individuals and groups. In this respect, the urban alliance has achieved a remarkable record on both fronts.

Many community organizations, including, in Metropolitan Toronto, the local boards of education, the Ontario Ministry of Education and the Metropolitan Police Force, have made significant changes in developing multicultural race relations policies. The urban alliance cannot claim total credit for these developments, but the organization certainly played a significant part in moving previously reluctant groups in a positive direction.

#### 1610

It is from this background that we speak to you of our concerns regarding the Meech Lake accord. First, we will merely mention our concerns regarding some aspects of the accord before moving on to more specific central concerns. We have great doubt that further constitutional reforms can be achieved when the Meech Lake accord requires that the federal government and all 10 provinces give unanimous consent to changes. The matter was difficult enough under the former formula.

We know of no other country in the world with this requirement of unanimity. For example, the American Constitution only requires three quarters of the states and two thirds votes of the House of Representatives and the Senate. It appears to us that the reform of the Senate, treaty rights for our native peoples and the possibility of admitting the two territories to provincial status are fairly well doomed for the foreseeable future under this formula. Our information is that Canada is already the most decentralized nation in the world.

The Meech Lake accord, it appears to us, reduces the power of the federal government to an unacceptable degree. It is no wonder to us that the accord received the agreement of all 10 premiers. The accord expands their powers while reducing that of the central government. It is also interesting that Jacques Parizeau, the newly elected leader of le Parti québécois, has publicly stated that Meech Lake makes it easier for Quebec to separate from the remainder of Canada, an eventuality which we strongly oppose.

But, as indicated above, our most important concern is related to the possible effects on section 15, the equality rights section of the 1982 Charter of Rights and Freedoms. We have heard various individuals and groups argue that the charter will not be affected. We have also heard and read the words of others who argue strongly that these rights will be severely undermined.

Those who are members of the visible minority groups have never had much confidence in the willingness of many provincial governments to protect our rights. In the United States it was state governments which passed the Jim Crow laws which ultimately destroyed the protections of the American constitutional guarantees. In Canada the provincial governments have in most instances ignored our rights or have enacted weak measures to protect basic human rights.

The experience of other countries offers little evidence that local or provincial governments will protect the rights of our native people. Although the federal government has also been reluctant to honour the legal treaty rights of native peoples, it is our opinion that far more progress would have been made had provincial governments and particularly the western provinces not vetoed any deal which diminished their powers. Native land claims have been ignored in order to make their resources available to rich, local multinational corporations.

Our specific concerns relate to section 2, fundamental freedoms, section 15, equality rights and section 27, multicultural heritage. It seems to us that a measure of ambiguity arises from these guarantees. If, for example, Quebec is a distinct society and decides to maintain Bill 101, does this mean that Bill 101 is a measure of a distinct society and, if so, what are the rights of English-speaking minorities and how will these rights be protected?

It seems to us that having apparently given away these protections and perhaps removed them from the courts, little is left except conjecture. The rigidity of the accord is worrying. Our own Premier (Mr. Peterson) and others have stated publicly that any changes will result in unravelling the agreement. Thus, apparently nothing can be done to make even minor modifications, a situation that makes us wonder why these hearings were ever set up if nothing can be changed. Are we to assume that this is an exercise in futility? We would agree with the Canadian Jewish Congress that if fundamental rights are not threatened, then this should be clearly spelled out in an amendment to the accord.

Our major concerns can be summarized as follows:

1. The question of the rigidity of the accord related to future amendments to the Constitution as these affect the rights of native people, and possibly reform of the Senate and other areas.
2. The apparent weakening of the powers of the federal government to protect the wellbeing of all Canadians through setting standards for federal cost-sharing agreements.
3. The apparent weakening of the federal responsibility for the protection of basic human rights, equality rights and the enhancement of multicultural heritage rights.

We are well aware of the provincial human rights codes and human rights commissions, but it is from the federal government through the charter that we



expect protection from the occasional violation by its own or other levels of government.

We strongly urge that your committee, even against the wishes of the Premier, at least demand the type of clarification that will reassure us that these basic rights as enshrined in the 1982 charter remain untouched.

It is the federal government, not the provinces, that signed and pledged support for and enforcement of the United Nations Universal Declaration of Human Rights forbidding discrimination on the basis of race, culture and other arbitrary grounds.

Finally, we are in agreement with the objective of bringing Quebec into support of the Constitution but, in our view, the price may be too high; nor are we convinced that the price was necessary. After all, Quebec needs Canada as much as Canada needs Quebec.

The Constitution in Canada is too important to risk losing the protection of its charter for what, in our view, is a flawed accord.

Mr. Chairman: Thank you very much for your presentation. We will have that on the record but, if you want to send that in after, that is fine as well and we will circulate it.

The three main points that you set out concern the rigidity of the amendments, the apparent weakening of federal powers and the apparent weakening of the federal responsibility for human rights and multicultural heritage. Perhaps we might work through those.

With respect to the amendments, it does set out that for certain specific cases there needs to be unanimous consent, but for many others it is the formula that exists at present, the seven-50 rule. What would you prefer to have there? Do you want what exists now, as was set out in the 1982 constitutional agreement? Even that has some areas of unanimity where it deals with federal institutions. Where would you like to see us go with that?

Dr. Head: The 1982 formula was a realistic one. It was a formula which had been hammered out over the years, going about 40 or 50 years, when they looked at this. In 1971, as you recall, when Trudeau was in power, he tried to get this thing through. They called it the Victoria formula and it was agreed to by all 10 provinces. But when the Quebec Premier at that time, Bourassa, went back to Quebec City, he changed his mind and the whole thing was undermined and destroyed. The Victoria formula was destroyed.

That formula required at least seven of the 10 provinces to approve, having at least 50 per cent of the population. In that sense, you are talking about a formula which had the majority of people supporting it. It seems that this formula requires that even Prince Edward Island with 120,000 people, could subvert anything in the Constitution on the grounds of the ones which it applies to.

It seems to us that some of these areas, particularly the reform of the Senate and the admission of new territories to the Constitution, etc., could be blocked indefinitely by just one province. That, it seems to us, is a rigidity. It is just simply inconceivable that we would have it. I am sure you recognize that in political situations people do differ and you very rarely get unanimity. If you can get 70 per cent you are doing very well. But here we talk about unanimous consent, which we think is almost possible to maintain in



those areas. I recognize, as you say, that there are some areas that are not affected but I am speaking of the ones that are.

1620

Mr. Chairman: I suppose the argument is that those are national institutions and that therefore, for that reason, there should have to be agreement among all of the players because you are changing institutions that affect all of the provinces. While I think one appreciates the argument in terms of size, is there not an argument to be made that where institutions of federalism are in question, all of the players need to be in agreement on that?

Dr. Head: I think that is true, if you do not want to do it. I would say that if you did that, you are saying in effect you are not likely to get agreement. I have never heard of political decisions made on which there was total agreement. If there are any, I would like to hear about them.

I am American born. I know the American situation very well and I have never heard of a constitutional agreement down there that had all the states on board. You had a high percentage. It requires three fourths and today it takes 36 states out of the 50 to ratify a constitutional agreement. But in the House of Representatives and the Senate, it is only two thirds. Again, it is a majority but not unanimous.

Mr. Chairman: I guess that is why they feel the Meech Lake agreement is rather exceptional in that it is an instance of them all agreeing. But the way you would like to see it is to essentially leave it as it was in the 1982 revisions and amendments?

Dr. Head: That is right, yes, or some close resemblance to that.

Miss Roberts: Your presentation today was very helpful in determining where your priorities lie. Our concern has been for a period of time the process by which we got here. As you are aware, our committee is, I believe, one of the first legislative select committees on constitutional reform as a result of this. Have you, as a group, considered how you would like to be involved in the making of the Constitution from now on? Because it is going to have to change whether Meech Lake goes through or not.

Dr. Head: We would like to be consulted before just as we were in the case of the 1981-82 Constitution. I recall so well that there were some situations there which the women did not like. The women's lobby went to bat and they were able to get changes. They got section 28, I believe it is, put in which said, in effect, that anything referring to men also referred to women in terms of equality.

That would not have been done had politicians met behind closed doors to do this. It was done as a result of the intervention of people who wanted to make some changes which recognized the status and the equality of women. I think we would like to have the same kind of opportunity to have that kind of discussion regarding racial and ethnic equality as well. That means before the thing is signed, not after.

Miss Roberts: Does your group itself meet on a regular basis and is it a lobby group to all levels of government? Just for my own information.

Dr. Head: I guess you could say we do both. Right now, we are lobbying the provincial government on the question of equal pay for work of

equal value and on the question of employment equity. We did the same thing a year ago with the federal government. In that situation the bill was passed but it was a very weak bill with no teeth to it, except for reporting.

Now we are focusing upon the provincial government. We have been in contact with the human resources secretariat, Dr. Elaine Todres, who is the staff person there, the deputy minister. We are also meeting regularly with the Minister of Citizenship (Mr. Phillips) and we have had meetings just recently with Raj Anand, the new human rights commissioner. We do have contact with all of those groups and others as well.

We do the same thing with the local communities, as well--the city of North York and the city of Toronto.

Miss Roberts: So you deal with all levels of government. I just wanted to be sure.

Dr. Head: Exactly.

Miss Roberts: It is my fault for not knowing this. Are you a national organization or just in this area?

Dr. Head: At the moment, we are in Metropolitan Toronto, but we have just established a provincial organization. We are the Urban Alliance on Race Relations, but just recently we established an Ontario Alliance on Race Relations, which has chapters right now in Ottawa, Toronto, Windsor and London. We have three other possible chapters that will be coming in, probably within the month of May or June in Sudbury, Kingston and Kitchener-Waterloo. So we are becoming a provincial organization.

Miss Roberts: From my understanding of what you said, if I might ask just one more brief question, you think we should not scrap the accord completely but make some changes that would appropriately deal with the threat you feel is there for multiculturalism and other equality rights. Is that a fair assessment?

Dr. Head: That is a fair assessment, yes.

Miss Roberts: Is it fair to say that you would like to make sure that section 16 included somewhere in it, or somewhere in the accord, that the Charter of Rights and Freedoms was not superseded by anything that was in Meech Lake?

Dr. Head: That is right, exactly.

Miss Roberts: Is that what you are saying would satisfy you?

Dr. Head: That is right. We are not objecting to all of Meech Lake by any means. A statement which would say in effect that the rights guaranteed under section 2, section 15 and section 27 will not be superseded by Meech Lake will satisfy us.

Miss Roberts: So you would even limit it to those sections?

Dr. Head: Those, yes. As I said earlier in the lead, we have other concerns, but those are the ones we focus on.

Mr. Allen: I appreciate the Urban Alliance on Race Relations coming before us and giving us the benefit of its advice on the Meech Lake issue.

The answer to the last question moved into the area that I wanted to ask you about, namely, the question of the charter in relation to the accord and your perception of that. I am not sure whether I heard you correctly. Did you say in effect in your brief that it was your impression that the charter has effectively been sidelined by the accord by not being mentioned in it?

Dr. Head: We are not sure of that. We cannot say specifically, but we say apparently, because it is not clear to us. When we listen to other people debate it, it is not clear to them either. We have heard both sides of this question. We have heard people say it has no effect whatsoever and we have heard people say there is a direct effect. We would like to see that clarified. We want to know that there is no effect. If we were sure there would be no effect on these rights we are speaking of here, then we would have no concerns.

But until that is clarified--and it should be clarified in the charter; it should not be left by some people saying that it is not there--we should not have to listen to the Minister of Justice or whoever say that, because the courts will not necessarily pay attention to what the Minister of Justice says; they will pay attention to what is written down in the accord as well as in the Constitution. Our concern then is to what extent this is not clarified and there is left what we call an ambiguity.

Mr. Allen: What would it mean to you to reaffirm the charter in the accord, which I gather is what your suggestion is? Is it your preference to see the charter reaffirmed in the context of the accord?

Dr. Head: Yes, I would like to see the charter reaffirmed, particularly those sections we mentioned, but certainly in a general sense the charter as a whole. I am very much concerned about section 2 and section 15, the fundamental freedoms section and the equality rights sections. I would not want to see, after the long battle to get those things installed in the Constitution, these being in any way at all diminished or undermined or whatever. It is not clear now as to whether they will be or not.

Mr. Allen: Would you expect to have them reaffirmed in the accord in a stronger fashion than they are in the charter, by separating them out?

Dr. Head: They are in the charter. No, I do not think we have any opposition to what is in the charter already; it is just a question of to what extent is that undermined or not undermined.

Mr. Allen: The reason I ask the question and the reason I ask it that way is that of course the charter itself does not provide an ironclad guarantee of the rights that are in it. Right?

Dr. Head: That is true. There is a section that has a "notwithstanding" clause.

Mr. Allen: It also has section 1, which says that no government is bound by the charter beyond what is reasonable in a free and democratic society. There is also the section which refers to affirmative action programs, and all of those do impact one way or another on the obligation on governments under the charter to deliver the rights in question.



The reason I ask that is I think many groups that come before us have the impression that if one reaffirms the charter, that really catches the governments and they have no way out, whereas the charter itself offers routes out. I was not sure how much of a guarantee you would be trying to get under the accord for the rights in question.

1630

Dr. Head: Actually, we would like to see the charter split in two, but we are not sure this is the time and place for that; we are trying to defend it right now.

Certainly there are areas in the charter which could be strengthened. I think there is no question about that. On the other hand, having been in this game as long as I have, I know very well that no charter provides absolute protection of anything. I cannot remember the name of the French philosopher who said that a charter is a piece of paper; unless the public out there wants the thing enforced, it will not be enforced.

Coming up, as I did, from the United States, I am very cognizant of the fact that the 13th, 14th and 15th amendments to the American Constitution provided rights, the freedom of voting and everything else to blacks in the states, but 10 or 12 years later, they were all taken away by the states. Those 13th, 14th and 15th amendments were undermined because there was no will to enforce them.

In a sense there must be a public will, otherwise a constitution of any kind is nothing more than a piece of paper. But at least it is a tool, it is a tool to be used, and we are strongly in favour of that particular tool.

Mr. Allen: Thank you very much.

Mr. Chairman: I have just one question on follow-up with respect to the charter. Have you or your organization or perhaps someone else from another organization looked at cases that have arisen dealing with race relations and how those are being interpreted by the courts? Have you tried to track through what difference the charter has made in any particular area?

Dr. Head: We have had very few of those. Most of the charter cases so far have been nonracial-type cases; they have been basically cases of women's rights and rights of the disabled. As a result, there has been no real challenge. We are concerned about that. For example, as far as I can tell--you may know--I do not think a single case has gone before the courts with support from the fund that has been set up to provide support and prepare cases under the charter.

Mr. Chairman: I was not aware of any case. I know we have heard a lot about some of the others you have mentioned. I was just wondering if there was in the system, in your view, a critical case in terms of the charter, particularly with respect to race relations.

Dr. Head: I do not think there have been. The most famous case I can think of now is a women's case undertaken with the CNR. That one went under the charter, but it was a women's case; it was not a racial case.

We also have concerns about the fact that the Canadian Human Rights Commission has not done very much on race either. Again, most of its cases have involved disabled people, native people and women's groups.

Mr. Chairman: Are there certain things just with respect to the charter, because of that, that you think need to be strengthened? Are there specific places? Apart from getting rid of the "notwithstanding" clause and so on, is there some other wording you would like to see in some of the clauses? What would be the general thrust of changes you would like to see in the charter, which in your view would strengthen it?

Dr. Head: In answer to that, I think we would not be able to say that we have any specific case. I think the concern we have is the question of access to it: how to get into the cases, get them prepared, etc. Basically speaking, we talk about money when we talk about getting these cases, as you know. We tend to prefer to go to the Ontario Human Rights Commission because that does not cost us anything; we do not have to pay any legal fees.

Without the funding to do so, we have very little access. As I said a minute ago, the government has set up a program, which is administered by the Canadian Council on Social Development, which does make funds available to prepare cases, but we have not had the opportunity yet to do any of those. We would like to find a good case to take to the courts under the charter to sort of see what would happen. We just have not done that yet.

Mr. Chairman: Thank you very much for joining us this afternoon. We appreciate your coming in. I think the three points you have set out are very clear and fit in with a number of comments that other groups and organizations have made as well. We are moving towards the end of our public hearings and are directed to report back to the Legislature by the end of the spring session. We thank you very much for being here this afternoon.

Dr. Head: Thank you. We appreciated having the opportunity to come before you.

Mr. Chairman: If I could then call upon our next witness, Patrick Kutney, if he would be good enough to come forward. If you would like to proceed with your presentation, Mr. Kutney, we will follow up with questions, once you have had some water poured there.

PATRICK KUTNEY

Mr. Kutney: I am led to believe that I am giving the last presentation overall.

Mr. Chairman: No, not necessarily. There is a question mark there--someone who could not might appear.

Mr. Kutney: You may find me the least prepared of anyone who has come before you, so we may have a little fun. I would like to thank you for having invited me, but I would like to apologize for not having a written brief to distribute.

Mr. Chairman: Excuse me. Just before you go on, I am wondering if there is a document there that--he has found it. OK, sorry.

Mr. Kutney: I am not blaming your clerk for this. I was originally led to believe I would appear one Monday in May and I was phoned about 10 days ago. To put it bluntly, I was in Manitoba fighting for the one leader who is unequivocal in being against the Meech Lake accord.

I have watched as much of the hearings as I could on TV, and I am going to try to address items that I have not seen touched on before.

I have noticed in your deliberations that there have been complaints about the process, initially by the members of the committee and then by witnesses. The process would not bother me if the first ministers had come up with constitutional amendments that moved the country forward or provided more unity or even kept us at a standstill rather than taking so many severely regressive steps. But where the Ontario government is at fault in the process, I feel, is in not having had public hearings in the time period between Meech Lake and the Langevin Block. Quebec, to its credit did, although nothing substantial came out of it.

Another objection I have to the process is that while I as a private citizen or almost any other resident of this country can appear, just as before the joint committee in Ottawa MPs were not invited or allowed to appear, I am sad to see that MPPs in this province have not been allowed to appear. Now it can be argued that MPPs have the possibility of speaking in the Legislature about Meech Lake, whether for or against, but here it is different from the Legislature and perhaps there can be more of a dialogue with questions and answers between an MPP and the committee.

Many of the witnesses who have come before you have tried to use these hearings as a forum for adding everything and anything, both sensible and absurd, that should be in our Constitution. Is it the mandate of this committee to add to the constitutional amendments of Meech Lake? Perhaps. But let us not cloud things. The issue is what is not good in Meech Lake and what should be taken out.

I regret to say that I can find nothing of worth in the accord. The intent is good, of getting Quebec's signature on the Constitution, but let us not mislead the public or the legislators. We are not "bringing Quebec into the constitutional family." Quebec has always been a part of it. The Supreme Court of Canada has ruled that Quebec receives all the benefits and rights accruing from the 1982 charter. The only instance where Quebec would lose out by not being a signatory is if Canada were in a state of emergency, such as a state of war and then Quebec would not have, as I understand it, as much of a say on something like conscription.

#### 1640

Let me just move on to one point in subsection 50(2), one of the very few things that is not ambiguous in this document:

"The conferences convened under subsection (1)"--referring to subsection 50(1)--"shall have included on their agenda the following matters:

"(a) Senate reform including the role and functions of the Senate, its powers, the method of selecting senators and representation in the Senate;

"(b) the roles and responsibilities in relation to fisheries; and"--I stress the following--

"(c) such other matters as are agreed upon."

If we have one of the provinces or the federal government saying, "I don't want to discuss such-and-such a subject; all we have to discuss is Senate reform and fisheries," that wording is very clear: "such other matters as are agreed upon." If they all cannot agree to discuss some aspect of the Constitution--aboriginal rights or whatever--it does not have to be discussed.



Very few people, I think, have come before you that like nothing in the accord. I am sure most of you argue: "What about Senate reform? You can agree with that, can't you?" I do not agree with Senate reform except a very small part of it.

I think it is very good to have a level of government that is not elected. MPs, MLAs and MPPs try as they might, and some are successful, cannot divorce themselves from asking, "What do I need to do to get re-elected?" The Senate does not have that; it is appointed.

We look at their work on the two immigration bills. We have the entire Senate against those immigration bills because they are not worried--and I do not mean to offend you--about being re-elected. I have no problem with Liberal, Tory or NDP bagmen or whatever being appointed. But I would like to see all of the appointees work.

My simple thing in Senate reform is to make the attendance laws that they have there more rigid. Hopefully we can have a Prime Minister who is going to appoint people who are partisan Liberals, partisan Tories, whatever, but ones who are going to take that job seriously and work at it.

In regard to the Senate reform and so many other aspects of the Meech Lake accord, we say we will change things in the next round. Well, are the 10 provinces going to agree unanimously, "Yes, we will give you back some of those powers"? And what are they going to get in return? Now, I am sure you, as legislators, believe from your individual parties, those who are on the government side, those who expect to be on the government side some day: "I will not hurt Canada. I will be a nation-builder. I will not be into a grab for the provinces." But is there one of you in this room who does not agree that at least one of our first ministers and his government is, to say the least, misguided? Are we going to be able to trust provincial premiers in perpetuity to be out for Canada's best interests?

If Meech Lake goes through, I do not want to hear the members of legislatures and the House of Commons complain about Supreme Court rulings on the Meech Lake accord. The Supreme Court is there to interpret it. It did not write it; that is not in its jurisdiction. The wording is so ambiguous and so open to a myriad of interpretations that those who want the best out of Meech Lake should not expect the Supreme Court to rule what you, as individuals or as a government, think is a best-case scenario.

I think the last thing I would like to address is a free vote. I hope that you as a committee can recommend this to the three provincial parties. Some of us, depending on our religious persuasion, believe in the infallibility of the Pope. The same, I do not think, could apply to the infallibility of our federal leaders of the three parties or the infallibility of our provincial leaders. Perhaps treading on dangerous ground here, I would hope that you recommend that the members of the provincial Legislature vote according to what they think is right. Now, while I have great respect for Ian Scott on many matters, I do not look on him as a constitutional expert. Ian Scott said many months before the Meech Lake accord came out that he agreed with Bourassa's five points.

1650

So we come to the free vote and how one deals with it. I am sure there are many members, say, in the Liberal caucus, who worry, "If I vote against this accord, David won't put me in the cabinet," or "It is going to offend my

federal leader." I cannot imagine anything in your legislative lifetimes that you will serve here that will be as important to vote upon as this. I will leave it at that.

Mr. Chairman: Thank you very much. You have touched upon a number of items. Presumably what you want to see is that the accord is essentially rejected and renegotiated. Is that fair enough?

Mr. Kutney: Yes. I mean, shall we say this constitution was done in a day, though it could have been spread over weeks, whatever, between Meech Lake and Langevin. But let us try again. I do not see the people in Quebec pulling their hair out because Quebec was not a signatory to the Charter of Rights in the Constitution of 1982. Those whom I do see objecting are the politicians, some of the media and a few academics. The mass public seem happy.

I am sorry, perhaps I am getting away from your question.

Mr. Chairman: Where do you see us going from here?

Mr. Kutney: Start over. It is not the end of the world. Try to get something. You know, it may take 20 years; it may take 40 years. We are not in bad shape now.

Mr. Chairman: On the five points that Quebec originally brought forward, do I take it, then, that you would not necessarily agree with those five points? It is not just the way the accord was drafted but that those five points, in your view, would not constitute the basis for a negotiation of a new accord.

Mr. Kutney: No. I cannot recognize one province or one province's inhabitants as being more special than another province's. We have to go on an equal footing.

Mr. Chairman: I suppose one could argue, as some have, that those five points represent the most modest proposals that have come from Quebec in that one of the constants over the years, certainly since the 1960s, has been some recognition of Quebec as a distinct society in some way or other. How does one then deal with that? Clearly, that has come from governments, but it would appear--

Mr. Kutney: I may be able to accept putting that in a preamble but not in an actual constitution. While it can be said that those are modest demands, perhaps we wait until we finally get a government that does have more modest demands.

Now, I am not an expert on Quebec history, but I think a couple of the submissions skirted around the history of Quebec. The way I see it, Duplessis, and Taschereau before Duplessis, held Quebec back, kept it very insular and did not allow Quebec to have its rightful place in Canada, and the rise of the Parti québécois was as a result of something from a decade or two decades before. It was a sort of lag process in that Quebeckers were happy with their state in Quebec, but they were thinking of how they were 10 or 15 years back. I believe certainly that in the last eight to 10 years Quebec has taken its rightful place in Canada and is not being kept insular by people like Duplessis, Taschereau and, in fact, the Catholic church.

Mr. Cordiano: Just very briefly, I understand your concerns with respect to the accord. In fact, I am very familiar with some of the views that

you have expressed. I just want to ask you, if we reject Meech Lake, what you think might be put in place of what is there now, first, because you have not really said, "Instead of doing this, let us do something else." What is that something else? Are you, in effect, saying let us leave things the way they are?

Mr. Kutney: I am not a constitutional drafter. If it were these people--

Mr. Cordiano: No, I mean conceptually.

Mr. Kutney: All right. Scrap Meech Lake, which takes us back to the 1982 Constitution, and try again. Work from there.

Mr. Cordiano: OK.

Mr. Kutney: If we are not successful, so be it, but what we have from 1982 is better than what we have from 1987.

Mr. Cordiano: In your opinion, who would speak for a province like Quebec? Would you think that the federal members of Parliament would have some more legitimacy in putting forth views of Quebecers, or would it be the members of provincial parliament or the National Assembly? Would they have an equal voice in expressing the view of all Quebecers, duly elected? Which one is it of those two sets of elected officials? I have heard various people say that the federal government should speak for all of Canada.

Mr. Kutney: Provincial governments can also speak for Canada.

Mr. Cordiano: OK. So when we are saying that, you are suggesting, in effect, by that statement that provincial members would have an equal voice in expressing the views of their constituents, who perhaps are the same constituents who elect federal members.

Mr. Kutney: To be blunt, it is really what is coming out of their mouths--I mean, what is worth while. It is hard to say.

I think perhaps they should be put on an equal footing, but I think you probably know better than I that in 1982 we were not on an equal footing and it was the federal government that had more of a say. Perhaps then, to change my mind, the federal government should have more of a say. It may take a long time, but I think we just have to keep trying.

1700

Mr. Cordiano: What it, in effect, says to me when we have Quebec's five demands on the table is that we ask the question, what does Quebec want as a province? Obviously, we have the same situation in Quebec as in any other province. You have the federal members elected to the House of Commons; you have provincial members elected to the legislatures. But we did not get Quebec in the Constitution, in the sense that the province did not sign on the dotted line for that 1982 Constitution.

Because we are a federation, then provincial support for any constitutional design is essential if federation is to work, the way our federation is set up. So we ask that question and we say, "Does Quebec have a right to speak on behalf of Quebecers, duly elected members of that Legislature having expressed the viewpoint during the 1985 provincial election



in Quebec that there would be some move to constitutional reconciliation, if you will, with the rest of Canada?"

I think they have received a mandate from the people of Quebec to do just that. That was part of the platform they ran on. So we have to say to ourselves, when we are asking what Quebecers want, that this is certainly something to be taken into consideration. That is what people did in trying to put together this 1987 accord.

I hold the view that we do have a set of conditions, if you will, or a set of points put forth constitutionally by Quebec which now all 10 provinces agreed to in principle. It remains to be seen how many more will sign on the dotted line--perhaps Manitoba and New Brunswick--but certainly Quebec put forward a position and said, "Here is what we want."

Mr. Kutney: Oh, I certainly agree that Quebec should be listened to. What I do not agree with is anyone having special powers that another province does not have.

Mr. Cordiano: OK. So what you are telling me is that you do not agree with Quebec's demands.

Mr. Kutney: Yes.

Mr. Cordiano: OK. Thank you.

Mr. Chairman: I have Mr. Allen, Mr. Smith and Mrs. Fawcett.

Mr. Allen: I am not sure what you mean by "special powers" that one province might have that another one might not have.

Mr. Kutney: Immigration.

Mr. Allen: What about immigration?

Mr. Kutney: Well, do they not get a percentage above? Let us see where this is. It says in section 2:

"(b) guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by five per cent for demographic reasons, and

"(c) provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation."

That is just one; but I am sorry, please finish your question.

Mr. Allen: I really wondered whether you were referring to powers as we normally understand them under the Constitution, such as the division of powers, or whether you were talking about conditions.

Mr. Kutney: OK. Yes. You are better with the English language than me. I suppose I have used a misnomer. Some of these are probably powers and

some are conditions. The mandate to promote and preserve rather than just preserve--I do not know if that is a condition or a power.

Mr. Allen: The reason I put it that way is that it is certainly true that under the Constitution we have lived under, the various provinces have not been on the same conditional relationship with each other or with Ottawa as all other provinces. Numerous provinces came into Confederation under different terms relative to the price that was paid to get them in, relative to languages in courts and legislatures. There is in that sense at present a special status that each province or many provinces have that others do not.

I just wonder whether that is part of your concern, whether you want to eliminate those kinds of differences and just where you are headed with the concept of special status.

Mr. Kutney: To be honest, I vaguely knew they existed. May I ask you, do you think the terms Quebec gets under Meech Lake go appreciably beyond the individual terms that each of the provinces received in joining Confederation? I do not know. I am asking.

Mr. Allen: If I could say so, our context is not one where you ask questions of us. It is where we ask questions of you.

Mr. Kutney: I am not trying to bait you. I am only asking the question.

Mr. Allen: None the less, there is in the existing and was in the existing frame of reference to the Constitution a special status for Quebec. The Parliament of Canada was not permitted to make laws with respect to civil property, for example, for any other than the three provinces that came in, but not for Quebec. Quebec had a right to do those things for itself in that domain. It alone of all the provinces was given the right or the power to have French used in the courts and in the Legislature of Quebec.

What is done in the Meech Lake agreement is to allow a slightly more generalized version of the 1867 agreement with respect to the capacity of Quebec to preserve and to promote its own identity as a province, which might move in some other linguistic dimensions than perhaps are presently there, but which we have also been told require some attention to the historic existence of an English minority which cannot be ignored in the equation.

It also provides for agreements with Quebec that might also exist with other provinces, and do exist, with other provinces around the immigration question. The Quebec agreement happens to be a bit more detailed than some others and pays attention to the fact that Quebec is the homeland or the foyer of the French language in Canada, a language which in international terms and in the context of North America is a minority language. Therefore, there is an element in there of affirmative action, if I can put it that way.

Otherwise, there is its historic place as a major province that might be attended to in amendment procedures regarding federal institutions impacting on it. In the area of the appointment of Supreme Court of Canada judges from the civil law panel are factors that are now constitutionalized that were not before. All of those I find quite acceptable.

I am not surprised that in order to get some agreement around that, however, in a constitutional sense, that other provinces felt they needed to be recognized in some new ways too. I also do not find that too troubling

because the federal government retains a whip hand in almost all of those regards--in the immigration section, for example, where federal standards must be maintained and where the charter principles and rights dominate any agreements and any behaviour by a province respecting immigration.

I find the balance is not too troubling. I do not see any real likelihood that a province will start marching vociferously and aggressively down some road to separation just on account of the accord. Some new wave of independentist impulse that might seize the province might, of course, gain a political head of steam. I can understand that, but that can be dealt with in political terms.

1710

Mr. Kutney: Sorry. How will that be dealt with in political terms?

Mr. Allen: It would have to be worked out. I think it goes without saying that any province that simply came to the overwhelming conclusion that it no longer wanted to be part of Confederation would have to be negotiated with; that is all. Where that would go, I have no way of knowing, but that is a reality that does not exist at present and which is not especially, as far as I can tell, promoted by the Meech Lake accord.

In fact, it could just as easily be argued, and I think is argued in some quarters, that some of the points that are conceded in the accord may well make it easier to live together in the federation with Quebec. I do not think the balance of argument tilts particularly heavily one way or the other, but none the less, the arguments are equally convincing, as far as I can see.

You asked me for a response to the question of political status, and I have given you my response.

Mr. Kutney: I thank you.

Mr. Allen: That is essentially why I was coming at the question of powers and conditions. There are those differentials out there that do exist, and I do not think they are extensively exaggerated in the Meech Lake report.

I wanted to ask you another question, and that had to do with an impression you left with me that the agenda that is set requires unanimity for future meetings. I see nowhere in the unanimity principle that Meech Lake proposes an indication that first ministers' conference agendas require unanimity.

Mr. Kutney: That is under the other formula.

Mr. Allen: Yes.

Mr. Kutney: I meant to change that. Forgive me.

Mr. Allen: OK. Thank you very much.

Mr. Kutney: Still, what is it? Seven provinces or--

Mr. Allen: And 50 per cent of the population.

Mr. Kutney: That still seems a bit much.



Mr. Allen: I do not think it is even clear, in terms of setting the agenda, that it even comes under the seven and 50. I do not think there is any part of the Constitution that says that first ministers' conference agendas do come under it. It really is kind of a matter of consensus. You could get two provinces that wanted it on and wanted it on badly, and the others would say, "OK, we will discuss it," and it is on the agenda. There is no way of substantially blocking it and there are a lot of--

Mr. Kutney: I disagree with you on that. I am sorry, I was thinking of something else. It seems to be very clear "agreed upon" means unanimity. It does not say anything about consensus here, majority. It is strictly "agreed upon." I think one or more first ministers will argue that point if he does not want to discuss a subject, such as native self-government.

Mr. Allen: Well, good luck to him, but-- Thank you.

Mr. Smith: As I have listened to your presentation and your comments, it seems to me you are definitely opposed. There is really nowhere in between.

Mr. Kutney: No.

Mr. Smith: I wonder if you could give us some of your thoughts as to where you would see Canada and the provinces to be if the Meech Lake accord is approved the way it is presented. It comes in, I guess, in 1990. Have you any picture in your mind as to the major problem, say, by 1995 or the year 2000? Have you got something in your mind there so I can see where you think we are going to go, because maybe I do not understand all of this document either. I am just trying to wear away at your thoughts.

Mr. Kutney: I notice the Progressive Conservative members have left and I can now get away with this. I know they take umbrage at this. The New Democratic Party and the Liberals are basically opposed to free trade. I do not think of it as a scenario. I think it is inevitable. We will go lockstep into this.

Through Meech Lake, the federal negotiating powers and spending powers will be so weakened that we will go lockstep into a free trade agreement with the United States. Canada is already recognized as being the most decentralized of western democracies. It is going to be even more so through this, as I see it. A country that will be as weak as we would be on a federal level--federal meaning the government--is really going to have weak bargaining chips. That is just one.

Mr. Smith: Do you see the two having to go hand in hand, free trade and Meech Lake?

Mr. Kutney: I think free trade with the US inevitably follows. There are those who have argued that there is some kind of intentional link between the two. I do not know if I would agree with that. A federal government has powers--and excuse me if I am wheezing--in the wrong sense here willingly stripped away.

There are other scenarios.

Mr. Smith: It is just fracturing the country mor. That is what you believe?

Mr. Kutney: Not so much--well, all right. I think fracturing the country more is another result of Meech Lake. Take the federal level of government being here, pre-Meech Lake, and the provincial being here. It does not show up well in Hansard, does it? With Meech Lake, provinces come up and the federal is reduced. I think this is the result. Is that colourful enough?

Mr. Smith: In another comment, you said you did not think Mr. Scott was a good constitutional lawyer. Are you a lawyer yourself?

Mr. Kutney: I am a blue-collar worker. But the person who I think is the constitutional expert in the country is not a lawyer, and that is former Senator Forsey.

Mr. Smith: Thank you.

Mrs. Fawcett: Thank you for making the effort to come here. Just going back to something you sort of alluded to, I am wondering if you think because of the focus that has been on Meech Lake, and it certainly has been in these last months and it is certainly revving up again--

Mr. Kutney: Days and hours, yes.

Mrs. Fawcett: --if we scrap it, are we not now saying to Quebec: "Sorry, you did not make it this time. You were not really important enough. You have to wait longer"? Are we not giving Mr. Parizeau sort of an open door and allowing that to get revved up again? I am just wondering what your thoughts are on that, because I think you said something to the effect that maybe Quebecers are not aware. I wonder if they are not now more aware. If they are not brought into the Constitution, if we do not pass it, is that not a clear message to them and rather a negative one?

Mr. Kutney: As I said before, with the exception of those three small groups--granted, groups of influence, though I do not believe they are influencing Quebecers on it--I still believe Quebecers will not complain because Quebec is not a signatory to Meech Lake. Has Mr. Parizeau not said that he would use the signing of Meech Lake as an open door for pushing for an independent Quebec, rather than the reverse?

Mrs. Fawcett: It remains to be seen just how powerful he will get. I, too, am worried about free trade, that agreement. If Meech Lake is not signed, does that open the door now between Quebec and the US because they have the hydro power the US wants?

Mr. Kutney: Quebec has always sold massive amounts of hydro to the US.

Mrs. Fawcett: I realize that, but if the rest of Canada is saying sorry, I worry about that influence.

Mr. Kutney: Certainly, provinces should be encouraged to use their own initiative on exports. I cannot see that necessarily leading to free trade with the US.

Mrs. Fawcett: I just worry about separation if we do not bring them in.

Mr. Kutney: Remember, it is the "bring them in." It is the name on the dotted line. I see more chances of separation by signing the Meech Lake agreement.

Mrs. Fawcett: OK. Thank you.

Mr. Chairman: Thank you very much, Mr. Kutney, for coming in this afternoon and sharing your thoughts with us and also for dealing with a number of questions. We appreciate your doing that today.

Mr. Kutney: Thank you very much for your time and your attention.

Mr. Chairman: We will go on in camera just to deal with a few business matters, if committee members could remain behind for a very brief few minutes.

The committee continued in camera at 5:22 p.m.





CABON

Xc2

-87052

C-26a

(Printed as C-26)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, MAY 4, 1988

Morning Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Also taking part:

Cunningham, Dianne E. (London North PC)

Clerk: Deller, Deborah

Clerk pro tem: Mellor, Lynn

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Ukrainian Professional and Business Club of Toronto:

Butsky, Victor V., Legal Counsel; with Blake, Cassels and Graydon

Wyslobicky, Dennis A., Legal Counsel; with Blake, Cassels and Graydon

Individual Presentation:

Whyte, Dr. John D., Dean, Faculty of Law, Queen's University



LEGISLATIVE ASSEMBLY OF ONTARIO  
SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, May 4, 1988

The committee met at 10:07 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: I am without my trusty gavel this morning, ladies and gentlemen. We will have to start without it. Just before inviting our first witnesses to testify, I would like to bring something to the attention of committee members. Those of you who were in the Legislature yesterday will recall that a petition was presented regarding Meech Lake. The petitioners have also sent me a copy, which we will enter into the record of our proceedings.

I will identify for you Dennis Wyslobicky and Victor Butsky of the Ukrainian Professional and Business Club of Toronto. We welcome you both here this morning. We have a copy of your presentation. If you would like to proceed, we will follow up with questions after you have made your presentation.

THE UKRAINIAN PROFESSIONAL AND BUSINESS CLUB OF TORONTO

Mr. Butsky: Thank you, Mr. Chairman and honourable members, for the opportunity you have given us today to speak before you on the Meech Lake accord. As mentioned, we are appearing on behalf of the Ukrainian Professional and Business Club of Toronto, which is an association of approximately 400 members of Ukrainian-Canadian descent. One of the goals of the club is to promote and support the cultural interests of Ukrainian-Canadians in terms of their interests in language and cultural goals.

Although the club is by and large Toronto-based, it does in many instances share common views with a number of other Ukrainian-Canadian associations which have similar views and are located in various communities across Canada.

The club does believe that Canada is, among other things, a cultural mosaic not only of French-speaking and English-speaking Canadians but also enjoys a mixture of people coming from various ethnic backgrounds. Approximately one third of Canadians have origins which are neither English nor French in terms of either cultural or language backgrounds. The Ukrainian Professional and Business Club of Toronto believes that the equality of all Canadians should be reflected under the law of Canada, in particular, under the proposed amendments in the Meech Lake accord.

1010

The Constitution of Canada, which prescribes a mechanism for protecting the cultural interest of all Canadians, also prescribes the way in which the legislative, executive and judicial powers must be exercised in order to fulfil those goals. In our view, it is essential that the Constitution of Canada reflect and protect the cultural heritage of all Canadians, not just specific groups.

The club considers that the 1987 constitutional accord contains certain amendments to the Constitution of Canada which, unfortunately, do not reflect and protect Canada's multicultural heritage. We consider that some proposals in the accord single out two groups, French-speaking and English-speaking groups, for preferential treatment and protection, perhaps to the detriment of Canadians who do not share that common background. The club has certain concerns about these proposals and would like an opportunity to refer to those concerns.

First of all, if I may, I will refer to a question of interpretation of the Constitution of Canada. I think the honourable members will appreciate that the Constitution of Canada consists of a number of documents; approximately 30 pieces of legislation come together to form what is the Constitution of Canada. One of those pieces of legislation is the Canadian Charter of Rights and Freedoms. Section 27 of the charter provides that the charter—I must highlight this—is to be interpreted in a manner which is consistent with the preservation and enhancement of the multicultural heritage of Canadians.

By way of contrast, section 1 of the accord, on the other hand, proposes that the entire Constitution of Canada, including the charter, is to be interpreted in a manner which is consistent with the recognition of the existence of French-speaking and English-speaking Canadians throughout Canada and that they are to be recognized as constituting a fundamental characteristic of Canada and, among other things, that Quebec constitutes a distinct society within Canada.

The relationship between the proposed amendments to the Constitution, as embodied within the accord, and the interaction with the charter can be best highlighted by a reference to section 16 of the accord, which provides that the proposed interpretative rules of the accord and the Constitution do not affect section 27 of the charter. In spite of section 16 of the accord, it is the submission of the club that the combined effect, with section 27 and the charter and the accord, is that only the charter is to be interpreted—I must highlight that—in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It leaves it open, in our respectful submission, that the rest of the Constitution of Canada, as mentioned, referring to a number of other pieces of legislation, will be subject to an interpretative rule which favours only French-speaking and English-speaking Canadians and Canadians in Quebec over Canadians of other cultural backgrounds.

The Ukrainian Professional and Business Club of Toronto considers that the proposed interpretative rule embodied in the accord is unacceptable and that the accord should be amended to provide a mechanism whereby the entire Constitution of Canada would be interpreted in a manner consistent with the recognition and preservation of the multicultural heritage of all Canadians of diverse ethnic backgrounds and that ought to constitute a fundamental characteristic of Canada.

Our second point, in our respectful submission, concerns the accord and the provision within the accord that the Constitution of Canada will affirm the role of the Parliament of Canada and the various provincial legislatures to preserve the stated fundamental characteristic of Canada relating to French-speaking and English-speaking Canadians only and, further, that the accord provides that the role of the Legislature and government of Quebec is to preserve and promote Quebec as a distinct identity.

In this regard, it is our respectful submission that the positive role of the various governments and legislatures to preserve, or preserve and promote, the language used within the accord—that is, to preserve and promote the stated fundamental characteristic of Canada and the distinct identity of Quebec—is again to be contrasted with the provision of the charter which deals with the question of multicultural heritage and interpreting the rest of the charter.

Section 27 of the charter is simply an interpretative tool which applies to the rest of the charter. The proposed amendments to the accord, on the other hand, referred to positive roles of various parts of government, that is, the legislatures of the various provinces as well as the Parliament of Canada. It is the respectful submission of the Ukrainian Professional and Business Club that the accord ought to be amended to confirm the role of the Parliament of Canada and the various provincial legislatures also to preserve and promote the multicultural heritage of Canada.

We would also appreciate the opportunity respectfully to submit a third point which the club considers to be an area of some concern. The Meech Lake accord contains a proposal that the Constitution of Canada is to be interpreted in a manner which is consistent in recognizing Quebec as constituting a distinct society within Canada and the role of the Legislature and government of Quebec to preserve and promote this distinct identity.

In our respectful submission, these proposals, however, do not expressly recognize the multicultural nature of Quebec and the fact that many Canadians of non-French or non-French-Canadian background are present in Quebec and that their interests in Quebec society ought also to be recognized as constituting an important part of that society.

The Ukrainian Professional and Business Club considers that the specifically stated role of the Legislature and government of Quebec—that is, to preserve and promote the distinct identity of Quebec—does not recognize Quebec's multicultural characteristics and that could adversely affect non-French-Canadians living in Quebec.

It is our respectful submission that the accord ought to be amended to expressly acknowledge that non-French-Canadians are an integral part of that society and help to make up Quebec as a distinct society within Canada.

Our fourth submission on behalf of the club centres on the accord and its affirmation of the role of the Legislature and government of Quebec in preserving and protecting its distinct identity. On the other hand, if again I may be allowed to contrast the accord with section 27 of the charter, section 27 of the charter provides only that the charter is to be interpreted in a manner which is consistent with the preservation and enhancement of the multicultural heritage of Canadians.

#### 1020

The Ukrainian Professional and Business Club considers that there exists the possibility of conflicts arising between this positive role of the Legislature and government of Quebec in discharging its duty to preserve and promote Quebec's distinct identity and these provisions of the charter which could be interpreted in the light of section 27.



If I may perhaps provide one or two examples of areas of potential concern, perhaps as one example, it may at one time be a possibility that the Quebec legislature passes a law which requires that the meetings of an organization, perhaps equivalent to the Ukrainian Professional and Business Club, meeting in Quebec ought to hold all of its meetings in the French language only.

Although such a provision may be seen as legislation furthering the interests of and preserving and promoting Quebec society in its distinct quality, that may be seen also as being an infringement on the right of free speech within the rights guaranteed by the Charter of Rights and Freedoms. Section 27 of the charter would only provide an interpretative rule, in our respectful submission, affecting the right of free speech and how that impinges upon the rights of certain members to conduct their meetings within a language of their choice.

Perhaps as a second example, legislation being passed within Quebec which may restrict certain ethnic groups from conducting language classes to promote and preserve their own cultural background or classes in their own private schools directed to matters affecting their cultural history could be seen as legislation, on the one hand, in the view of the Quebec government, designed to promote the preservation of Quebec or French-Canadian ethnocultural interests but, on the other hand, as impinging upon, in view of certain guarantees within the charter, the rights of associations to gather and speak as they choose.

The Ukrainian Professional and Business Club considers that there exists a number of different possibilities for conflicts arising between the positive role of the Quebec government, on the one hand, discharging its duty to preserve and promote this distinct identity of Quebec and, on the other hand, what is provided by section 27 of the charter, which is an interpretative rule which affects the rest of the charter. Although section 16 of the accord seems to exempt section 27 of the charter from operation, it is our respectful submission that there may be situations which arise under Quebec legislation which are not adequately foreseen within the rest of the proposed amendments contained within the accord.

It is the possibility of conflict and perhaps creating a fertile ground for cases of this kind coming before the courts that the club is trying to avoid. It is our respectful submission that we are asking that a clear legislative framework be set up to avoid this kind of area for potential misinterpretation of what is obviously the choice, in our view, of most governments to preserve the rights and interests of all Canadians.

In conclusion to our various submissions, the Ukrainian Professional and Business Club does support amendments to the Constitution of Canada which would assist in the interpretation of the Constitution and would also affirm the roles of the Parliament and government of Canada and the provincial legislatures and governments to preserve and promote certain fundamental characteristics of Canada.

The Ukrainian Professional and Business Club of Toronto, however, considers that the accord does contain certain proposed amendments that do not adequately reflect or protect the interests or the goals of Canada's multicultural groups or the multicultural heritage of certain Canadians. Accordingly, the Ukrainian Professional and Business Club considers that the accord should be amended in these respects to satisfy the four concerns that we identified earlier.

Mr. Chairman: Thank you very much for your presentation. I think you have set out a number of concerns that have also been brought before us by a number of other multicultural organizations. I recall in particular the presentation that the German-Canadian Congress made. They also touched on a number of these same points. We will try to explore those a little more fully in our questions.

Mr. Allen: I appreciate very much the fact that the Ukrainian Professional and Business Club has come before us to present what I take to be a very thoughtful brief, attempting to relate various sections of the accord to the charter and to other elements of our Constitution.

May I also preface my remarks by saying that I have a Ukrainian wife and we enhance the multicultural dimensions of Canadian society as often as we can.

Could I ask you, first of all, is it your view that this is your only chance, if I can put it that way? I think sometimes I have a sense that some of the groups coming before us have the impression that we are sort of sealing the Constitution in this whole exercise, that it will be hermetically closed from here on and therefore there will be no option to affect any of the elements, either of the accord, the charter or other aspects of the Constitution.

Do you have that sense? Or do you have a sense that we are into a long-term process of constitutional change, maybe not quite as extreme as the Swiss, who have had 88 different constitutional amendments, I understand, over the past 150 years, but none the less something of an ongoing process? What is your critical sense of the moment?

Mr. Butsky: If I may, my personal feeling is that constitutional change or reform is not a matter that takes place very often. One is very seldom given an opportunity to make submissions with respect to certain points that arise in the matter of interpreting constitutional questions and constitutional issues. Attempts at changing legislation in this area, I respectfully feel, are very seldom provided to individuals.

This perhaps is a rare opportunity that we do have to seize upon at the present time and make our feelings known before this committee. So if I may just point out that this opportunity may not again be presented to us within the near future, so we do feel that it is an opportunity we should take at the moment.

Mr. Wyslobicky: If I might answer that as well, I am familiar and I guess most of you will be familiar with the tax reform proposals that are going on at the federal level. I would want to remind everybody that the business transfer tax or value added tax proposals that are seen as the solution to our federal sales tax problems are not something that is proposed to address an issue that has just come to light. The federal sales tax legislation has been known to most practitioners, accountants and indeed the people in government to be terribly flawed since its introduction in the 1930s.

The point I want to make is that if something as simple, in relative terms, as federal sales tax legislation can still be kicking around in a form that everybody acknowledges is undesirable after some 50 years, then my personal view would be that something that is so much more fundamental, so much more complicated and has so many different aspects to it as the Constitution could face even more difficulties in amendment and getting things right.

1030

Mr. Allen: I am not sure about the comparison of constitutional and nonconstitutional provisions and issues, none the less, we are all familiar with the resistance of government and legislation in constitutions.

Your point is well taken. We have had inordinate difficulty in the past with constitutional amendment, but it is interesting that in the last decade, we have been pretty well preoccupied all through the decade with various aspects of the issue. We have had an aboriginal round of discussion, which unfortunately in my view, did not work out satisfactorily and I hope it will be taken up again.

So my suspicion is that we are going to be into a long series of constitutional meetings that will take up one unaddressed aspect of the Constitution after another until we perhaps get it right. I doubt that will ever happen because I think life just goes on, perspectives change and needs alter the demands on the Constitution.

I ask you, without being too mischievous, did you make a representation in the course of the aboriginal round?

Mr. Butsky: No, we did not.

Mr. Allen: Was there a reason for that?

Mr. Butsky: No, there was not.

Mr. Allen: That perhaps highlights the point. I suspect there may well be another opportunity.

I understand the points that are made, but I am a little puzzled by the use of the language of equality, because we have at least determined in Canada, I understand, officially, that there are two official languages and therefore two official language groups in a broad sense, each of which tend to break down into multicultural subdepartments. How much of your concern is linguistic? Can you separate that out from your cultural concerns? The reason I ask that is I suspect you are not asking for linguistic equality as an official language.

Mr. Butsky: No, we are not.

Mr. Allen: How does that affect your arguments?

Mr. Butsky: Although we are not asking for linguistic equality in terms of being recognized as yet another official language, our submissions are directed to the ability of existing communities within Canada to maintain their rights to carry on, in those instances where they choose to use their own language, be it in the form of meetings of their associations, to use their language in terms of church meetings and so on, in the home.

Language questions of that nature relate indirectly to the question of culture. Certain ethnic groups do consider the right to carry on with their language as an intricate part of their cultural background. The two are intertwined, if I may say. The question of culture is at times confused with a person's language background, and the two should be separated for matters of argument and so on.



However, in terms of cultural background—getting back to this point of language being an intricate part of that—it is our feeling and our submission that our groups, in particular Canadians of Ukrainian-Canadian background, ought to be given an opportunity to preserve that cultural background, that mosaic they have developed by coming to Canada well over 90 years ago, in some instances. It is that ability to carry on with their meetings, their various cultural and ethnic activities, that should be permitted.

Mr. Allen: My sense of what you have said then is that there are two languages that have a special kind of status by virtue of being official. The provinces, as formal political entities, function in one or other or both of those. Likewise the courts and the official structures of government have various degrees of mandate to operate that way. I hear you conceding that sets up an initial and prevailing inequality. Inevitably, English-speaking groups, by mother tongue, and French-speaking groups, by mother tongue, are going to have a built-in advantage that will be almost impossible for any other cultural group to acquire. Is that right?

Mr. Butsky: Well, we are not here with the view to actually acquiring a recognized right to carry on official functions in the Ukrainian language, or, for that matter, in languages other than French or English, but, rather, to preserve our opportunities to maintain those functions and those recognized activities which clubs like, for example, the Ukrainian Professional and Business Club of Toronto, have typically carried on in the past and those recognized activities which further and promote the preservation of our cultural background.

So, if I am understanding the honourable member in terms of his question, we are not seeking an opportunity for official status in terms of a recognized group requesting official status in having certain official functions carried on in its language. That is not what we are asking for.

Mr. Allen: I have no problem with the expansion of your present capacity. I have been a very ardent advocate of significant extension of heritage language instruction in the school day and so on, as a matter of course, and immersion schools for language instruction in Ontario and so on. I have no problem with that. I am just trying to get a realistic assessment of where we stand on the language issue and whether one can, inherently, with regard to our Constitution, talk of equality in that formal, full and complete sense, or whether what we have to do is focus our thinking around some other aspects of the issue that we want to maintain. But, if one comes before a committee and speaks the language of equality, then one is always in trouble. Do you see the point I am trying to make?

Mr. Butsky: Yes, I do.

Mr. Allen: There is a dilemma there and I understand it, but it is one that is worthwhile recognizing in and for itself, clearing our heads of what may be the implications of broad-spectrum equality language, if I can use that term. I do not want to make life difficult. I am just trying to get a clear fix on the issue.

Mr. Wyslobicky: I guess what we are trying to convey is a fairly straightforward and narrow message. I think this was Mr. Butsky's first point. That is that the interpretive provisions which are proposed in the accord, as well as the positive obligations on the Parliament of Canada and the various legislatures, seem to be broad enough to cover things which relate directly to the multicultural heritage of Canada and the different people in Canada.

The governing bodies of this country have seen fit to put certain interpretive provisions within the Charter dealing specifically with the preservation and enhancement of the multicultural heritage of Canadians, and we think that similar provisions should be included to cover other aspects of the Constitution. I really think that our message is that simple. I guess it is unfortunate we have used the word "equality" because equality means so many different things and you can be equal in so many different ways. I think our message is more simple, more fundamental than that.

Mr. Allen: Just a last question. I do not know whether you are familiar with the Charter of Human Rights and Freedoms in Quebec, but a quick leaf through it indicates—and this pertains to your distinct society question and what is recognized and what is not recognized to be the nature of Quebec society—I would suspect, that the Charter of Human Rights and Freedoms in Quebec would be a document that would reflect in an official way what is understood to be the status of various groups and peoples in Quebec itself and, in that sense, would reflect the distinct society.

1040

I note, for example, with regard to your concerns, there are at least five central passages that are pretty fundamental. One of them is the fundamental freedoms passage: ??"Every person is the possessor of the fundamental freedoms, including the right of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

Second, there is the discrimination section, which requires ??"the right to full and equal recognition in the exercise of all human rights and freedoms, without distinction," for a whole series of groups, which includes those of language, ethnic and national origin.

There is a section which refers to the cultural interests of minorities: ??"Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group." There is a section relating to conditions of employment that would seem to have implications in that respect.

There is also a general section, section 50, which states: ??"The charter shall not be so interpreted as to suppress or limit the enjoyment or exercise of any human right or freedom not enumerated herein."

Finally, there is an affirmative action section which is explicitly included: ??"The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment or in the sector of education or health services and other services generally available to the public," and ??"An affirmative action program is deemed nondiscriminatory if it is establishing conformity with the charter." Therefore, one would presume that under that provision, affirmative action programs for the enhancement of the cultural and ethnic and language interests that are otherwise referred to in the charter would not, in any sense, be illegal and would certainly be sustainable in the courts.

I wonder if you consider that those items have any significance for you in your concern about the "distinct society" provision in the charter or about the possible fate of ethnic groups in the context of Quebec.

Mr. Butsky: If I may, you have been referring to the contents of

Quebec legislation. Although the Quebec legislation, as presently framed, does deal with a particular interpretation of what "distinct society" means and what the forms of protection for that distinct society are now, the question that we are addressing at the present time is the definition and interpretation of that phrase, "distinct society" as found within the Meech Lake accord.

In our respectful submission, the interpretation given to that provision may be different from the interpretation given to the Quebec legislation. The question of a distinct society, the factors that go to make up that distinct society within the Meech Lake accord and the degree to which ethnic groups or groups of different backgrounds ought to be protected within the accord is a question, in our respectful submission, which ought to be addressed within the accord itself.

The mechanism for protecting the interests of various groups throughout Canada ought to be reflected within the accord to prevent perhaps mischievous attempts in the future to detract from the rights and interests of other groups across Canada, be it within Quebec or elsewhere, the idea being that the mechanism ought to be clearly set out in the Constitution itself to preclude what may be seen by some people as being attempts by certain provincial governments to detract from minority interests.

Mr. Allen: Thank you very much.

Mr. Chairman: Mr. Allen referred to a number of dilemmas. I think the number of horns that we, as committee members, find ourselves now resting on or near grows all the time as we continue our way through the hearings. On that positive note, I will turn to Mr. Offer.

Mr. Offer: I would like to thank you very much for your presentation. I think in one of your opening responses you indicated that it is important for your association to seize the moment to express your concerns with respect to the accord. I think that is very important and it is certainly well taken.

I have heard and read your four concerns with respect to the accord. It seems to me it is trite to say that these concerns are all centred around the whole question of the multicultural mosaic and interpretation and rights and things of this nature, and how you think the Constitution should be worded so as to make certain that different programs in this area are able not only to be preserved, but also to be carried on and embellished in as many ways as possible.

I do not think anybody is really going to object to those particular concerns—I do not think so—but as I read your concerns, I think the first one talks about a possible amendment to section 27, which is not the accord, in terms of strengthening the language because you want to embody the whole Constitution.

This is a fairly new process in dealing with the whole question of constitutional reform. It seems that if anything is coming forward, there is the thought that when you are talking about the constitutional reform process, there is always some sort of focus. The focus we have heard, whether people are for it or against it, is that these have been characterized as the Quebec rounds, that the purpose for these rounds was to get Quebec not only legally but in fact inside the whole constitutional family.



The whole process of reform is one that is continuing. I think Dr. Allen brought that forward in his first question whether you think this is the end, as opposed to maybe the beginning of another round. My question is whether your concerns, valid as they may be, are concerns that we should be directing, in our report, be initiated in a further round of constitutional talks. If you want to characterize it as a multicultural round, fine; it does not matter.

There seems to be this thought that there are these characterizations of the rounds. There is the Charter of Rights. There is the repatriation. Now we have just completed the Quebec round. We have in this accord a section that talks about constitutional process on an ongoing basis.

I would like to get your thoughts on the whole question of the Quebec round being completed and now moving into another round of constitutional talks, be it Senate reform, be it fisheries, be it multicultural matters, be it aboriginal concerns, but that when you start to put one on the other, in many ways nothing could ever be done, that you have to have the focus, complete that focus, successfully or unsuccessfully, and then you move to another round, another focus.

I am wondering if your concerns are such that we, as a committee, should consider in our report requesting that type of round take place, and of course that would mean the accord itself should go forward without the amendments you are talking about in this round.

The second point I would like to make is that if you do not think so, if you think there should be amendments, as you have proposed, in this Quebec round and if Quebec as a province says no to those amendments and this whole accord falls apart and Quebec is no longer in fact a written partner in this Constitution, then I ask about the practicalities, from your sense, of ever entering, of ever entering into, into—la-la-la-la-la-la—of ever entering into—I had my French lesson this morning.

1050

Mr. Chairman: It is the problem of preambles.

Interjections.

Mr. Allen: Going for the gold.

Mr. Offer: I want to catch Hansard on this one, let me tell you.

—a round that would address your concerns; I think it is a practical matter. A short question.

Mr. Butsky: If I may address the first concern first, it is our respectful submission that indeed it is an honourable goal, a vital goal that we see Quebec enter within the framework of the Constitution and that it be allowed the opportunity to sign up, as it were. Indeed, that is something that ought to be the goal of all Canadians, to see Quebec join as an equal partner in signing the Constitution.

However, in terms of characterizing the focus of the particular amendments that are contained within the accord and suggesting that focus is merely a question of having Quebec enter into this agreement avoids the question of what it is that is being dealt with within the accord. Our respectful submission is that the accord deals with things which are cultural

questions, which are matters that deal with questions of language and culture, matters that necessarily affect minority communities both within Quebec and other parts of Canada.

It is our concern that once these issues are addressed within the broad question of having Quebec enter into this partnership, this opportunity will no longer be open to us at a later date. Once the questions and issues which arise on this question of distinct society, and those cultural questions which form this part of a distinct society, have been addressed, our opportunity will perhaps be lost to ask that these same kinds of issues be addressed at a later date with a view to protecting the interests of certain minority groups across Canada, whether it be within Quebec or elsewhere.

Our respectful submission is that the accord already deals with these questions of multicultural heritage in a broad framework within the possible interpretation that could be given certain phrases within the accord, be it within the context of the interpretative provisions contained within the accord or within those provisions that deal with the positive roles placed upon the various levels of government, be it provincial legislatures or the Parliament of Canada. There are certain roles that are given or presented to the various governments and it is our concern that those amendments will necessarily detract from the ability of certain groups to deal with those points at a later date.

Mr. Wyslobicky: On a related point, I guess the accord has been characterized by some as a Quebec round because it is obviously bringing Quebec into the fold. I think we must also not lose sight that the accord is broader than that. It deals with things like agreements on immigration and aliens, the Supreme Court of Canada and other issues. While some people may try to characterize it as being the Quebec round, it does deal with broader issues, and in fact if it is addressing these issues that impact upon multicultural heritage provisions, then while it is dealing with those related provisions, it should now deal specifically and squarely with the multicultural issues we have raised.

Mr. Offer: I understand your answer. It is indeed an answer to the question I posed, but there are sections within the accord that talk about the yearly first ministers' constitutional conferences. Under this accord, under this document, we are now being given in very many ways a right to carry on with the whole question of the constitutional reform process. I am somewhat restating my first question. I think the concerns you have raised are certainly concerns that should and must be addressed, not as something that is ancillary to a Quebec round, but as a focus unto themselves. My concern is that it should not be done in the Quebec round, but rather as a focus just for that one purpose.

Mr. Butsky: Although we can recognize that this would indeed be a goal to be sought, that is, to have an opportunity to focus our interest and attention on this particular issue in a separate round, we are concerned that the opportunity may not present itself for whatever reasons and that even though the issue has only been raised in an ancillary fashion, once it has been raised, the importance of that issue perhaps is deflated for purposes of future reference.

Perhaps it will weigh in the minds of others who will say that issue has been addressed only recently and that perhaps we should address something else at a later date. The priority that would be afforded to this particular issue may be reduced because it has already fallen within the framework of this

matter of bringing Quebec within the fold, the question of cultural rights and distinct society as recognized for Quebec. If it includes questions relating to ethnic or minority groups and their rights to carry on certain activities in their languages, that issue, that right has already been addressed.

Perhaps the opportunity will not re-emerge to make similar submissions, as they specifically focus on minority rights, until some time much later in the future simply because it will be viewed in certain minds as already having been dealt with just shortly before. That is our concern, that the broad net cast by the proposed amendments now will prevent us from making submissions at some reasonable date within the future and that perhaps some mischief could take place in the interim.

Mr. Offer: Just as a final point, I would take somewhat the opposite view. I think the whole question and discussion surrounding Meech Lake throughout the country and the impact certain groups feel it will or will not have upon them has done absolutely the opposite. It has not submerged those interests, but rather more and more people each day are saying, "Yes, we have to have further rounds with different focuses." This whole question, discussion and debate for and against Meech Lake, when all is said and done, has brought out the importance of the Constitution to so many people as to how particular groups should be recognized within the Constitution.

I sort of see it the other way because you are reading every day on the front page of every newspaper and hearing from radio and television about the Constitution, which I think is a healthy process. I think we have a little difference of opinion, but you have raised extremely important points and I thank you very much.

Mr. Butsky: We can only hope that your predictions are correct.

1100

Mr. Chairman: Perhaps I might, on behalf of the committee, thank you both very much for coming in this morning and making your presentation, and also for the answers, not only to questions but to statements, thoughts and musings that have sometimes come forward from the committee. At this stage in our hearings, you can appreciate that we have been down a long road, but it seems that with each presentation there none the less are still some elements we have not necessarily looked at, so we are very grateful that you could be with us this morning to focus particularly on the multicultural aspect of the Constitution.

Mr. Butsky: I would like to thank you, Mr. Chairman, and the honourable members as well.

Mr. Wyslobicky: Thank you very much.

Mr. Chairman: Perhaps I might next call Professor John Whyte, dean of law at Queen's University. If you would be good enough to come forward, Dean White, we have a copy of your presentation which the clerk is passing out. I think a number of us have had the opportunity to hear you on this or related matters. It was very good of you to arrange your schedule so that you could spend some time with us this morning. I think I will simply ask you to proceed with your presentation and we will follow up with the questions. Welcome.



DR. JOHN WHYTE

Dr. Whyte: I am told by my friends from the Ministry of the Attorney General and the Ministry of Intergovernmental Affairs that this is the last presentation from the street, so to speak.

Mr. Chairman: The Queen's street has been a long one.

Dr. Whyte: Yes, I suppose that two of the very early presentations were by my colleagues, W. R. Lederman and Beverley Baines. It has been a very large issue at Queen's, this Meech Lake accord. Someone was saying the other day that perhaps at Queen's we should have focused a little more on free trade, where the action is—but this was following the Sharon Carstairs pronouncement—and that Queen's had backed the wrong public issue.

The other thing I want to say by way of preface is that I just heard the chairman say, very graciously, to the former witnesses that even though it has been a long, long haul, all of February, March, April and now May, things new are still being said. I do view that as a statement of graciousness, if not utter honesty; I come with the full realization that the chances of saying anything very new are pretty well zero.

I begin by apologizing for that. I guess the only thing that gives me the arrogance to come and burden you on this lovely day with observations you doubtless have heard before is that I do think it is a serious issue, that Queen's University faculty have not backed the wrong public policy issue, that this is a very, very crucial matter for the future of Canada and that it is important that all of those who are urging there be a vote, "Yes for Canada," and a vote, "No for Meech Lake" come and explain why it is they think that way.

It is not the way that has a lot of political champions. I suppose you might have trouble believing that, because sitting in this committee I suspect you hear an awful lot of negative critique and think the whole world must be against Meech Lake. From the outside, I think the most devastating part of the whole Meech Lake implementation process has been the lack of political championship. Of course, some provincial opposition parties have opposed it, and now a government; following the election, Premier McKenna is opposed, or at least is wavering towards being opposed.

But the absence of national and even highly visible provincial political opposition has caused some despair about how very, very crucial issues relating to the structure of governance, organization, values and ultimately policies in Canada get chosen.

For instance, in this province, the Premier (Mr. Peterson) has heard repeatedly the claims against the Meech Lake accord and has acknowledged those claims against the Meech Lake accord. He recognizes it to have flaws, even serious flaws, but he is sticking to the line that this is a seamless web and that the pulling of a single thread would cause the whole thing to unravel. That line is followed then by the line that if this accord unravels, then Canada will unravel, because the intensity of resentment in Quebec will be so great as to foreclose the possibility of constructive dialogue in the future.

I think that is an hysterical view, a view which does not accord with the way politics is actually played out, that is, there is a continuing political imperative in Quebec to obtain a larger political community within Canada and that imperative is not going to wither simply because of defeat nor

is it necessarily going to manifest itself in the most extreme form possible, independence.

I would not say that this government of Quebec is a federalist government. Certainly, it is not a federalist government in the sense that former Prime Minister Trudeau meant a federalist Quebec government. But I would say that it is a committed member of the Canadian community, if only for noninspirational reasons. I think that the idea that we are losing Quebec's participation in Canada, Quebec's capacity to participate in political dialogue and political discourse, Quebec's interest in working for a constitutional reform which gives a larger political community to Quebec is just wrong.

Robert Stanfield, the former Leader of the Opposition in Ottawa, has gone on record as saying that probably the most devastating evening for the Canadian state was November 4, 1981, at which point nine provincial governments agreed on a constitutional accord which the Liberal government of Mr. Trudeau accepted the next morning, excluding Quebec. That was a time bomb—a metaphor which is used very frequently, by the way, in relation to constitutional discussions and, I guess, quite an apt metaphor. After all, constitutions last a long time. If they do damage, then they are time bombs.

The fear is that the agreement on November 4, 1981, signed November 5, 1981, is a time bomb for Canada because it provides a lightning rod for Quebec separatist sentiment and Quebec nationalism. That same fear, I know, is driving the provinces of Canada, in the context of the Meech Lake accord, that to turn down the Meech Lake accord is to reignite—is this a sound metaphor? I do not know—the time bomb of November 4, 1981, and to continue to provide fuel for Quebec resentment about its place within Confederation. I think that is wrong. I think there are sound, plausible reasons which Quebecers can understand about the nature of Canada and about the nature of the Canadian state which would explain to them why this is not an acceptable compromise.

Let me just say one thing more concrete about this, that is, for most of the eras of Quebec nationalist constitutional politics, the campaign has been to generate specific constitutional arrangements which reflect the distinctive quality of Quebec within Confederation. In so far as that process is the process, it seems to me to be a solid and valuable process to pursue.

The trouble with Meech Lake is that it does not come forth with specific provisions which reflect a larger political community for Quebec. It comes forth with general statements, the meaning of which is very hard to determine. These general statements have two defects actually: The first is that their meaning is very, very hard to determine; the second is that they express a resolution of a very, very deep systemic conflict within Confederation. They express that resolution at such a grand level, at such a global level, that I think it is unsatisfactory for Canada.

Let me be more specific about this. I do not think I have got this idea across at all well. I am saying that Quebec is not going to be so disenchanting that nationalist politics will gain the upper hand and have the upper hand for ever. Quebec understands the nature of constitutional politics. The nature of constitutional politics is to work for concessions which reflect a greater political community for Quebec.

The traditional way that has been argued for has been in terms of points—the 14 points that were advanced in the pre-1979 period and the five points advanced by Gils Rémillard at Mont Gabriel in 1976—and there have been points that have been sought for by Quebec for a long period of time. These points are specific. They confer specific access to power in relation to specific matters, and that seems to me to be something we ought to negotiate about.

Should Quebec have consultations on appointments to justices of the Supreme Court of Canada? Probably it should. Should Quebec have three guaranteed seats in the Supreme Court of Canada? It already does. Should Quebec have 24 out of 106 senators? It does. Not only is that the way we have been talking to Quebec and the way Quebec talks to us about constitutional reform, but also it is the way our Constitution is already designed. There are many distinctive features for Quebec in relation to civil law, the courts, language and education.

Meech Lake leaves that mode and writes a very, very general statement. I am going to repeat what I said before because I do not think I got it out at all clearly. There are two problems with a general statement. One is that the actual content of that statement is not clear. How it will cash out in day-to-day operation is not clear. So what it means is that we have placed the resolution of Quebec's place within Confederation in the hands of judges and have taken it away from political processes. That seems to me not to be good constitutional politics.

To put it more baldly, we do not know what "distinct society" means. It is a loose cannon. It is an unwieldy concept. It is a concept which is going to dash the hopes of Quebec five times out of every time it is argued and it is going to be a concept which inflates Quebec to probably dangerous levels for some of the interests within Quebec five other times. It is a concept which generates both hope and despair and, as it is cashed out in adjudication, it is going to produce both hope and despair. It is not a stabilizer; it is not a comforter; it is not a peacemaker; it is the seeds of continuing bitterness, resentment over dashed expectations.

That is the first thing. We are not dealing with specific things that we can deal with concretely and fixedly in the Constitution like three judges from Quebec, like consultation on appointments. The second thing about the Meech Lake accord is that there is a very, very deep conflict in this country about an appropriate language policy for Canada. That deep conflict can be described in terms of geographic base to language dualism and bilingualism.

We have had for 14 years a Prime Minister who pushed the idea of bilingualism as the appropriate Canadian response as hard as it can be pushed, with some resentment and some backlash but with a tremendous amount of success in terms of just the commitment to French and English language throughout Canada. I am not here to argue for the Trudeau vision of Canada. I am only here to say that there is a bilingualist vision of language policy in Canada and there is another vision of language policy in Canada which is that there is a homeland for languages in Canada.

There is a homeland for French and there is an appropriate geographical place for English, and if we all work effectively in the language which is appropriate for our area and learn to co-ordinate and co-operate and to get along in Ottawa, then that is a sound language policy. After all, there are



many nations of the world that pursue a language policy exactly like that.

The only point I am trying to make is that that is a fundamental cleavage between two language policies in Canada. I think the strength of Canada depends upon neither one of them gaining ascendancy. As in most major philosophical and social organization debates, whether they are about state capitalism and private enterprise, whether they are about trickle-down economic development or social redistribution, the truth is that stable democracies are built on the nonresolution of those major cleavages, that is, the tension in those major cleavages.

Meech Lake, I think, utterly destroys that tension and delegitimizes the bilingualist vision of Canada. I think it will lead to a kind of language policy in Canada which will be unfortunate because it removes the tension in the first place. In the second place, I think it is a bad language policy, which I will get to in a minute.

One thing I did not ask you was how long I am supposed to talk. Maybe I should quit soon.

Mr. Chairman: No. Please make sure you get forth all your ideas, even though that clock is rather—

Dr. Whyte: Do not be rash. You do not want all my ideas.

Mr. Cordiano: There are no time limits.

Mr. Chairman: We are fine for time. We are explorers.

Dr. Whyte: I have noticed that there are no time limits. I want to say, by the way, that is a tremendously admirable thing about the Ontario select committee and, of course, it is an unexpected thing. The Ontario select committee was anticipated, I suppose, to be probably pretty lockstep into a process to which the province is committed. That you have spent this much time, heard this many people and given this many people a chance to talk about it has actually brought Meech Lake into the democratic process in a way that was almost inconceivable last summer.

It certainly was not in the democratic process during the joint parliamentary hearings, and that is to be said in favour of this process. I heard you just say to the former witness how much has come out of people who are interested in these issues, and I think that is marvellous.

In the paper which has been distributed I have three parts. The first talks about the process. I am not going to talk about the process, because it merely says how unfortunate it has been that there has been no champion for opposition to Meech Lake at the political level. I was tempted to appeal to your sense of honour, boldness, bravery and courage to strike down Meech Lake, even though there are political leadership problems with that, but that is merely beside the point. I really want to talk about the merits of the accord, not make school spirit speeches.

The defects of Meech Lake are in the second part of my submission, and I think most elements are defective. I do not want to canvass those in detail. I canvassed them in much greater detail in the submission I made to the joint parliamentary committee, a copy of which is now attached to this. It was

published, and the published version is now the last 14 pages of my submission. In any event, I think copies were sent earlier.

Let me just touch on the defects very briefly. The annual meeting for constitutional discussion is a serious problem. First, it is not the way in which major political accommodation should normally be achieved in this country through constitutional reform. Certainly, it should not be achieved through the kind of constitutional reform process that took place at Meech and Langevin, that is, people fairly seriously detached from constituencies and advisers for long periods of time coming up to an agreement and declaring that it is absolutely fixed. It is not the way in which constitutionalism gets acted out in a way which is responsive to democratic values. Second, it is not even the way in which politics get acted out.

Going back to a point I made earlier, the political conflict must be resolved but it need not be resolved for all time. The habit of resolving political conflict through all time through excessive constitutionalization is very dispiriting and deadening of the political process in Canada. Annual meetings seem to me to establish a pattern for doing politics in this country which is not conducive to democracy. It is as simple as that.

Furthermore, I suppose there is the rather technical point that those meetings will never produce anything, since most matters in the Constitution now require unanimity. So why worry about it? The reason I worry about it is that every 50 years there is going to be a Prime Minister who will give it all away in order to get an agreement, for whatever political reason. If it happens only once every 50 years, that is too often. As a nation, we cannot have a giveaway Prime Minister once every 50 years and we are never going to have 10 giveaway premiers at one time. There is no doubt that there is a ratchet effect to annual meetings, and that is the continuing decentralization of power in Canada.

I urge you to recommend a sunset clause. Let us meet for five years and talk about the triple-E Senate and aboriginal rights, please, and maybe the constitutional provisions that might need to be changed in order to make free trade effective, if we go down that route, but not for ever.

The second thing is the north. I just think that it is the Canadian history that fledgling communities have grown into capacity to govern and they have had easy access to self-government through actions of Westminster or Ottawa. The provincial interest in not expanding the number of provinces because expanding the number of provinces so diffuses the power that is enjoyed at the Senate and Supreme Court—revenues from natural resources would be the chief one, actually, and so forth—means that these fledgling communities are not likely to get off the ground as provinces.

1120

I think that is an act of sheer and utter ungraciousness and a denial of the way Canada was built, the kind of communities that came into being through the recognition that people had attained the right to govern themselves and to control their own resources.

Of course, it has an added sadness to me, and that is that the eastern Arctic was going to become or had hoped to become an Inuit public government, that is, a public government. There is something very attractive about dealing with aboriginal government through public government, that is, not having enclaves of race-based government, not having a form of apartheid. That is a



loaded word, and I do not mean to load up the case against aboriginal government by using that. But the eastern Arctic was a very, very positive development in terms of development of aboriginal rights in this country, and it is over. I think it is absolutely over now, by virtue of the provisions relating to the north.

On the shared-cost programs, I make the point in the submission to the joint parliamentary committee, and I guess I made it again here, that it is true, everyone says this is an age for new public expenditure on social programs. I am not so sure that is true. Even if it is true in the 1980s, it will not be true in the year 2010 necessarily, and under this clause there are going to develop very, very powerful provincial political imperatives to maintain autonomy.

One has to understand that provinces—maybe all provinces more than Ontario—I think Ontario really is the most nationally oriented in its perspective and I am not trying to flatter you, because I do not know that that is necessarily positive. I am neutral about it. It is a nationally oriented government, but most provincial governments see their mandate being to secure the interests of their people against the majority of Canadians, as represented by Ottawa.

It is a very, very powerful political imperative, and if you put in a lever like the shared-cost provisions, the new section 106, which allows provinces to maintain autonomy and to be paid for it, regardless of the big-spiritedness of the provincial leader—whether it is a Blakeney, who was actually quite big-spirited in his day, or some other—the political imperative of that provincial culture is such that there is no way that leader can act in that big-spirited way and go along with a national shared-cost program.

He or she must act to protect the interests of that province, especially when there is compensation provided, and protecting the interests is maintaining autonomy for the province and avoiding the infliction of national majorities on provincial interests, which is what shared-cost, spending-power programs are: the infliction of national majorities on provincial interests. Even if some people like it for a time, as I say, the political background of the province would require a provincial leader to say: "Sorry, but I can't do it. I have a political imperative to listen to here. My people want autonomy." So I think that shared-cost programs are in very big trouble.

I also want to say that you cannot really conceive of a national government putting in place an expensive shared-cost program over which it has absolutely no control in terms of whether it reaches any of the national objectives it sets, and the cost of which is totally out of its control unless it pulls the plug on the whole thing.

Appointment to the Supreme Court? Well, you know, all that Rémillard and Bourassa asked for was consultation, something like the Victoria charter. They only wanted into the game. They only wanted to be consulted on appointments, and maybe even have a double veto on appointments, but if they could not agree, then to go to an arbitration process, much as was in the Victoria charter and was in Bill C-60 from June 1978. Now they have the power to appoint Supreme Court justices. All provinces do have the power to appoint Supreme Court justices.

Only Quebec, by the way, has the power to appoint Supreme Court justices without being whipsawed. The other provinces, of course, and I am sure you



have heard all this announced before, can be whipsawed by virtue of the Prime Minister saying: "I don't like the people you are putting forward and I know that on, say, Estey's retirement, there is a very, very strong presumption it will be an Ontario lawyer. I am not actually constitutionally bound to that, and if you keep on putting up names which I find so unacceptable, then I will go to some other jurisdiction."

That is not true for Quebec. Quebec will put forward a name publicly; maybe it will put forward two names publicly. It will put them forward with a case for the appointment of those people; those people will not be impeachable except on ideological grounds; and there will be no opportunity whatsoever for the federal government to control appointments to the Supreme Court of Canada.

Secondly, the fallout from this kind of court will be to have a particular court. The saliences at work in the public mind day after day after day are going to be Quebec, court, the rest of Canada, court. It is going to be a court that is marked by its being a binational court, or it is going to be a court the saliences of which are going to be provincialism. Provincialism is not the heart of the court's jurisdiction these days. The heart of the court's jurisdiction is the Charter of Rights and Freedoms and individual rights and fundamental rights. To introduce this salience front and centre into the makeup of the court seems to me to be stepping backwards in time.

Actually, I could go on more about the Supreme Court. It seems to me it is very problematic.

Appointments to the Senate: That is what people call the time bomb. I suppose it is a time bomb for reasons I am sure you have heard, and that is that the Senate does not need a great deal of encouragement for it to find legitimacy. Being elected would give them legitimacy. You people know in your bones that being elected is legitimizing. But short of that, being given a particular task on behalf of a particular interest is also highly legitimizing.

The removal of the Senate from a kind of reward patronage system to a particular political task is going to make the Senate extremely powerful. We know that. How do we know that? Because the present Senate has a distinct political task. It views itself—perhaps accurately, I will say—as being a check, the only effective check, on a massive Progressive Conservative majority in the Mulroney government, the only access that a whole bunch of interests in Canada have to the parliamentary process.

The Senate is not behaving that way because Allan J. MacEachen is a person who does not understand the way the world runs; he does understand the way the world runs. He knows he has a function to perform and that he has been legitimized to perform that function, and he is doing so responsibly, I may say, that is, providing a second sober thought and holding things up, although in the end, not necessarily holding legislation hostage. That kind of role, it seems, is going to get considerably more aggressive, and we will have a Senate that is not acting responsibly, as I would characterize, although I am sure Mr. Mulroney would not agree with me, the MacEachen Senate.

I think we will have a bicameral system of government for which we have no attendant constitutional rules for resolution of conflict. Furthermore, arguably, we will have it for ever. What chance is there for constitutional reform? Why is it that Quebec or Ontario would give up control over 24 appointments to the Senate, almost one quarter of the Senate, for something else? How could they ever do better than they have under Meech Lake? So what incentive is there for people to go along with Alberta's idea of an effective, equal, elected Senate?

Immigration: I am not happy with the expression of nationality that is caught up in the concept of saying to immigrants to Quebec, and it will be Quebec that makes the deal, the Cullen-Couture deal will be, yes, put in the new immigration section.

I am not happy with the idea of a country that says to immigrants to a province, "Your status among us, your role among us, your place among us, is now entirely a matter for the province." I think it is a denial of the idea of coming to a nation, the idea of nation or the idea of citizenship or a pre-citizenship, in this case, to a nation. I am not as enthusiastically opposed to this as I am to some other revisions.

### 1130

Let me turn now to the "distinct society" clause and say that it is an interpretative provision. There are two things we know about this interpretative provision and one thing we do not know.

The two things we know are, first, what an interpretative provision does and, second, who it is who gets to do it with an interpretative provision. The thing we do not know is what it means. That is a bad combination.

What does interpretative provision mean? It means that every time there is a phrase of the Constitution which is to be applied in a particular context, in the context of particular legislation or litigation, that understanding of that phrase is to be checked against fundamental characteristics of Canada. Is this an understanding of the phrase? Is this a meaning of the phrase which is constant with, congruent with, consistent with this fundamental characteristic of Canada, these language characteristics and these social characteristics of Canada?

There are doubtless many phrases in the Constitution which are neither consistent nor inconsistent with the language provisions in the "distinct society" clause, but I do not think there are actually all that many. I think that the room for application of this clause is fairly extensive.

First of all, all the clauses are elastic, ambiguous and capable of adjustment and change over time and, second, an awful lot of the governmental powers and the governmental limitations expressed in the Charter of Rights can be given meanings which have some impact on the language rights and the language position of Canadians. There is, therefore, a fairly extensive capacity for this phrase to shape meanings.

Looking at the Charter of Rights, for instance, we know that freedom of speech is clearly to be affected by this. After all, this clause was chosen by the Quebec government, among other reasons, for its use in the *Chassures-Brown* case, the case about signs. This was not an unconscious, coincidental effect of this provision. This is a Bill 101 clause.

We know it will have some impact on the interpretation of mobility rights. We know it will have some impact on equality rights and we know that it will have some impact on minority language education rights. That is just four and, of course, the equality rights are an immense bundle.

So it will have impact and it is not a light brush stroke. It is not just an invitation to the courts to have regard for this as a feature, as is section 27, the multiculturalism clause. It shall be interpreted "in a manner consistent with," which is strong language. It is, I argue, no less weak than



the language in section 2 of the Canadian Bill of Rights which, when violations of the Bill of Rights were found, which was not often, I admit, had an absolutely, totally effective effect in stopping the legislation in Drybones and the ~~McKay~~ case.

There is little doubt that the impact, the interpretative power, given in the new section 2 will give, of course, a considerable capacity—in fact, a considerable mandate—to interpret clauses to reflect the fundamental characteristic or the distinct society.

I think Peter Hogg is just wrong to minimize it in his book. I see the book here. When he talks about it, he simply says it does not apply to the charter. Of course, it does not remove the charter. We look at the charter all the time. You have heard W. R. Lederman, and I think he explained to you exactly how that process works. People make a charter claim, but there is a counterclaim to it by the government and it is based on section 1. A reasonable limitation is fuelled very much by the language provisions, I think.

The second thing we do know about it is that the place in which the meaning of these phrases will be worked out is in the courts, not among us, not among politicians, not among academics. Of course, it should be academics. That is a silly statement. But it is not going to be worked out in terms of a political accommodation. It is not going to be worked out by looking at the legislative record to see what Quebec thought it meant or what other premiers thought it meant. In fact, if it were to be worked out that way, we would have a pretty conflicting story. Bourassa has come out very strongly about what it means and most of us have sought to try to deny that.

I think there is something problematic about putting in the phrase some words which are essentially—I am not going to say void of meaning, because later on I am going to say they have some very specific meanings, but very unclear and very indeterminate, very uncertain about what exactly it does mean and then have courts try to work out the political accommodation to that language for ever. It does not seem to me to be a way to construct a constitutional society.

As I said to you earlier, I think it does mean that we are committed to geographic-based dualism of language, and it is not a bilingualist supportive or sympathetic provision. I think that is true about paragraph 2(1)(a). I think it does create a strong message of geography-based language claims.

Moving to the distinct society, it is pretty clear that the distinct society that Quebec refers to is not the distinct society that is described in the previous paragraph, that it has an English minority, but a distinct society of—how do I say it is clear? We do not know until a court says. I do not mean to be bolder than I ought to be. I think that it has been represented in Quebec as being this and I think it will be found by the courts to be this: that it is Quebec as the predominant home of francophones in North America and that will produce special needs in Quebec. The preserve and promote will be not to promote the rights of anglophones less the rights of allophones, but the rights of francophones in Quebec.

I want to go on to say that at the crux, at the very centre of Canada's survival as a nation is the position of anglophones in Quebec, in Montreal primarily and I guess in Sherbrooke. I say this because the extent to which we have a Quebec government which is willing to recognize a bilingualist society to some extent, which guarantees rights to participate in English to some



extent, to conduct life in English, to have a life in English is the extent to which we have a nation which will recognize the same right nationwide.

I fear that the "distinct society" clause as a legitimator of hostile actions to the anglophones in Quebec will generate nothing but disregard for bilingualist policies anywhere and everywhere. I go on to say that when we are a nation in which we all know our language by virtue of where we live, then we will be a nation in which French will not be hospitably treated. The sheer electoral reality is that French cannot be sustained in Canada simply because it is the language of Quebec. The numbers do not warrant that. The political commitments of Canadians do not warrant that. French survives in Canada and francophones belong in Canada because there is a national commitment to French being one of the founding languages, French-Canadians being one of the founding people wherever they are found, and there is a historical right of francophones, French-Canadians, to live in Canada and to continue in their language and culture to some degree.

When we locate French-Canadians in their place and they themselves seek to deny the reality of the historical fact of English-Canadians in Quebec and we retaliate by denying their reality in the rest of Canada, we will have a nation, I think, in which we do not have two languages and two cultures. We will have a language which is moving to a kind of language balkanization and deep conflict.

I think people like Robert Stanfield are wrong. The real time bomb in constitutionalism is not that Quebec gets excluded in constitutional occasions or that its constitutional package gets rejected. The real time bomb is that we do not have an open policy towards two languages in Canada and Meech Lake is a major contributor to that result.

That is all I have to say. I am sorry, I did go on too long.

1140

Mr. Chairman: Thank you very much. I think you have indeed touched on a number of issues and you have brought a couple of perspectives. Frankly, we have not addressed the accord in quite that way. I wonder if I can start off with a couple of questions.

You made a point about the kinds of tensions between certain broad policies, be it the bilingualism versus the dualism; that, in a sense, a country such as ours is best not to come down firmly on one side or the other; that, in a sense, it is that tension that keeps us going.

In looking at the generality of the accord, if you were applying that comment about the generality to the charter, would it be fair to say there are some similar problems with the charter as there are with the accord in terms of not knowing perhaps what it means?

Dr. Whyte: Yes.

Mr. Chairman: How do you then balance those? As I think back to the discussion around the charter, there was an awful lot of discussion about the end of Canadian society as we knew it.

Dr. Whyte: Yes.

Mr. Chairman: Perhaps that has happened. I am not sure.

Dr. Whyte: There are always alarmists.

Mr. Chairman: We still do not know, really, what the charter means in many respects, but is there a difference there, in your view, looking at those two through that optic of how general the language is?

Dr. Whyte: I think that is a fair comment, that we were caught in a tension. I view it as a sharp, critical comment and I think it is good—I mean critical of my position. We were caught in a tension between being a rights-respecting society, through a whole bunch of informal or less than constitutional means—an implied bill of rights, provincial bills of rights, the English tradition of restraint, whatever—and parliamentary sovereignty, and we did resolve that. We came down hard. Section 33, the "notwithstanding" clause, is almost totally beside the point, at least up to this point anyway.

We did come down hard and resolve that against parliamentary sovereignty and we put a lot of major policy questions into the accord. I do not think it is the end of society and I do not think in 50 years it is going to be the end of society. I do not think it is not the end of society only because we have enough time. Maybe that is a salutary comment. We do make shifts of major political value. They are shifts and they are differences, but we just go on, and I think that can be said.

I do want to say one thing about the charter, though, and that is that in the charter itself there is a very, very deep conflict between individual rights and history-based group rights, and that is not resolved at the present time. In fact, I would say the reason that aboriginal constitutionalism floundered was that we never could resolve how important history-based group rights are. That is not resolved, and it might be resolved in the ??Andrews case, which was heard in the Supreme Court of Canada, or it might take decades for it to be resolved. But on the other salience, between rights-respecting regimes and parliamentary sovereignty, we came down on one side.

Mr. Chairman: Suppose we take that and look at the request Quebec made through Rémillard's statement for some recognition of the distinct society, which suggests some reference to collective rights. I would agree with you that the bilingualism concept of Canada and the dualism are to a certain extent opposed. On the other hand, clearly there must be, at least in my mind, a source, in the case of the two, of the smaller one, i.e., the French and in that the Quebec government, being the only government which one could argue is controlled or has the potential to be controlled by a French-speaking majority, is going to see the protection of the French language as being important to it, whatever the federal government may or may not do.

How then do we begin to get that balance in our constitutional framework? If we try to define the distinct society too carefully and say it means these three things and nothing more, does that then allow for Quebec? It would seem to me that has been a constant in a lot of what they have put forward, some recognition of the distinctiveness of that society.

So I wrestle with the view that I want to see bilingualism expand and spread across the country but I also recognize that somehow the Quebec government does have a special role, a distinct role in preserving that French fact. Is it not a legitimate desire on their part to see that somehow enshrined in the Constitution? Maybe this is not the way to do it, but is that in your view none the less a legitimate desire?



Dr. Whyte: Yes. I might wonder if there is not less stark language than "distinct society," especially "distinct society" as it was articulated by Premier Bourassa. There are a number of ways in which I think it could be ameliorated. For instance, there could be a clause added saying that all levels of government are committed to assisting minority-language speakers and providing opportunities for Canadians to learn both official languages.

I actually think that the "distinct society" clause perhaps ought to be altered to recognize that Quebec has, among other special characteristics, a majority that speaks French and a minority that speaks English and that constitutes a distinctive part of the Canadian federation. I think if we were to change it to make sure that part of the floor was the rights of anglophones in Quebec, then we would have a political morality or a political condition in which francophones throughout Canada would have strong and equal claims.

I do not think changing it that way would reduce the power which the Quebec government would get to promote francophonism, because what we are saying is that, as a distinctive quality, it has a majority that speaks French. That is distinctive, that is unique and it does place upon the Quebec provincial government special obligations to make sure that it is not swamped or lost.

Part of my idea for reform is to just take away the bald language of "distinct society"—"distinct" also carries an idea of "separate"—and replace it with a statement in favour of bilingualism, a statement about Quebec's special responsibilities vis-à-vis French and a statement about Quebec's English minority, because Quebec's English minority, as I said before, I think is the bellwether of bilingualism in Canada.

Mr. Elliot: I have a couple of points that I would like to ask you to comment on a bit further. Before I do that, I would like to thank you very much as a layperson for coming as a constitutional expert and talking to us this morning.

I think some of the other people probably share my view. When someone like yourself starts talking point by point through the accord, as you very capably did, it leaves us a bit breathless, particularly on this last day of testimony. Tomorrow we have to start making up our minds about what we are going to do about this package. It certainly focuses in a nice way at this point in the hearings. I thank you very much for that.

The first thing I would like to talk about is something that was not clear to me when we started the hearings or certainly when the Meech Lake accord came on the scene at first. I was one of those people who said that Quebec did not really belong to Canada because it had not signed the Constitution. Other constitutional experts have told us that really is not the case, that Quebec did not need to sign the accord back in 1981-82. The fact that the present accord is there and Quebec is willingly signing it, subject to some conditions, is the thing I would like to focus in on a little bit more.

For example, we have had a lot of representation from native peoples, everything from a single band leader to a regional band person to a person representing all of the Indian bands in Ontario, coming before the committee. The very definite feeling I got, either implicitly or implied by what they said, is that without Quebec being a willing member of a group sitting down to talk about its rights, which it wants negotiated on a continuous basis, they wonder whether the negotiation is going to be valid at all, and I wonder that too.



1150

In your presentation this morning, I wonder it with respect to two other groups of people, namely, the French-speaking peoples outside Quebec and the English-speaking peoples inside Quebec. There seems to me to be a forum where, attitudinally, all of the premiers and the Prime Minister and representatives thereof have to come together with the right attitude towards negotiating conflict areas of that type.

My specific question is that, because they represent approximately 25 per cent of the Canadian people, if they do not willingly sign to be part of our country, will a meaningful negotiation be possible from this point on?

Dr. Whyte: Not over some matters, of course, over which unanimity is required.

Let me back up and say that is right, Quebec did not sign and, as you say, witnesses have told you that it is bound by the Constitution. I think even more important is nor are they legally bound by the Constitution by virtue of the Quebec veto case. I do not have any access to attitudes within Quebec that is better than anybody else's, but the evidence does not seem to be strong that the failure of the Lévesque government to sign that accord produced a strong, widespread sense of dismemberment.

After all, the three things that he went to the people saying were so galling about it were that he would not be able to get compensation for constitutional amendments that did not involve culture and language, that is, he would not be able to get money not to participate in national changes; that mobility rights might be a problem, and that minority-language education rights extended to all Canadian anglophones and not just Quebec anglophones.

My sense of that is that the population of Quebec did not say, "Wow, did they ever gore us." I think it has proved over the years to be a nought and the substance of exclusion not to be a point of grievance. The symbolism of the events, of course, is. I do think Quebec's not signing does get overplayed a little. But you have moved it to a much more functional level, which is that whether they are caught or whether their population has a grievance or not, the truth is that up to the present time, since 1982, Quebec government leaders will not sign constitutional amendments and that is a fact, so we are stymied in constitutional reform.

There are two things I would say about that. In relation to aboriginal governments, that has not been the problem. It is true that because Quebec will not sign, then the coalition of the three most-western provinces has produced a problem. If Quebec would sign, then that coalition would not work.

I think that is not a way to deal with aboriginal rights in this country, to get the seven eastern provinces to gang up on the three western, anyway, especially since we are putting in place texts on the aboriginal government side which are only promissory about future processes. What is the point of ramming that kind of promise at the three western provinces with Quebec's participation? It is going to produce nothing anyway. Aboriginal government is going to come because there is a national appreciation of the rights of aboriginal people. I think Quebec is not irrelevant, but it is not devastating that it is not a participant.

In terms of the other kinds of things that you talk about, yes, there clearly are some important matters which Quebec's nonparticipation would hurt,

but I will repeat what I said earlier. I am all in favour of going back to Meech Lake. I am not saying, "Don't accommodate Quebec and don't have a Meech Lake accord." I am saying, "Let's get rid of the parts of the Meech Lake accord which seem to—" I know when I gave my list that seemed to be every part, but I am a half-a-loaf person. Make some improvements and I will be happy and a lot of people will be happy.

I think what the opponents of Meech Lake say is that surely four o'clock in the morning at Langevin cannot be as refined as we get about these things, especially when we see such obvious problems. Why do we not deal with the obvious problems? Why do we not realize that constitutions are not perfect? There will be some problems, but constitutions are at least perfectible; not to perfection but just improvable. That is my answer, really. If Quebec's nonparticipation is a problem, let us deal with Quebec. It has rights for constitutional reform, but I think these ones are very costly.

Mr. Elliot: My supplementary has to do with the same kind of idea, only with respect to process and where we go from here. It seems to me that your comments with respect to the openness of this committee and how people giving testimony were received by the committee were significant, and again I thank you for that kind of comment. A number of people have communicated that same kind of idea to us. There is a very definite feeling that the committee is listening and would like to make positive action based on the comment that is given to us by way of testimony.

The kinds of things that might frame up after these hearings are fairly obvious, because in Ontario, where we represent approximately one third of the population, what happens in the country very much has to be a reflection of what Ontarians feel or there are going to be some problems with it. If the kinds of hearings we have had with respect to this committee were held in advance of a meeting like the Meech Lake meeting, they would be very beneficial.

Do you have any comments on what sort of format might be used on a continuous basis by the government of Ontario to make sure that the people are heard so that the process is more meaningful?

Dr. Whyte: I think there is no single process for putting constitutions in place. The one that is in the Constitution Act, 1982, of provinces just passing resolutions without a prior meeting probably will not work. There have been some started, such as the property rights amendment from British Columbia. I suppose it has now run out. I do think we will get constitutional amendments without the Meech Lake and Langevin Block type of first ministers' meetings.

I know I was being hostile about that and I want to say that I have a complicated sense about it. It needs a whole bunch of kinds of inputs, and I think political leaders meeting and talking about where they want to go and even putting out a draft text like this is probably the way constitutional amendments should be made. I do think there ought to have been an awful lot longer period between Meech Lake and Langevin and there ought to have been more officials' meetings and more meetings of politicians with people to get their concerns.

People knock the 1980-82 process as being antidemocratic. I never bought that. That stuff was played out pretty publicly, and what the Charter of Rights was going to look like was put out all during the summer of 1980. You never went back from a meeting, whether it was in Vancouver, Montreal, Toronto



or wherever, without having a whole horde of people into the legislative building to talk to you about what they heard through the paper and to get the story.

I worked for the government of Saskatchewan. There was nothing formal like this but there was an awful lot of sitting around the table trying to explain, trying to get views. That went on in Ottawa following October 4, 1980. It went on following the Supreme Court reference. It was not a bad process. Obviously, we are not going back to that. That was an unstructured, confrontational, ugly process too, so we do not quite want to clone that one, but the idea is first ministers' meeting, getting ideas, getting draft texts, getting public participation and meeting again. I think it makes sense.

In fact, Meech Lake may turn out to be the perfect process in the end. I think Langevin was too soon after Meech. We had Meech Lake. We had Langevin. We have hearings. We are getting a sense of problems. Political opposition to it is being expressed. It may be that the combined effect of the Manitoba election and the New Brunswick election will force people to go back. I think there is fair amount of goodwill about it.

If Quebec is not too resentful about being brought back to the table, which I do not think it can logically be—in its own self-interest, it cannot refuse to negotiate—five years from now I could be sitting around saying, "This was a great process." You put out something and you make it seem pretty serious and pretty formal so that people will take it seriously, and then you shoot at it and try to refine it. Maybe we are in the middle of a very healthy process.

1200

Mr. Elliot: The final comment I have to make with respect to that leads from what you just said. I felt very uncomfortable about the unanimity part of the whole process at the beginning, but the more we have talked and heard people talk to us, the more I feel that there are a lot of things with respect to Constitution-building that require unanimity, because if somebody walks away mad about any particular item, he is not going to do anything about it anyway.

In fact, the attitude towards negotiating that type of thing is really an important attitude, in my view, at this point in time. I do not think the kind of formula for constitutional amendment that was there can be really used effectively any more because of that. So I am feeling very comfortable about that. That is what I read into your comment too, that in some things unanimity very definitely is required and it should be there.

Dr. Whyte: Yes, in some things it is, and I think it is required. One of the things about unanimity is that it actually cashes out to be a subtle form of consent. It never is one for one. It is always OK for Ontario and Quebec to use their veto, but I think it is true that McKenna could not have held off Meech Lake by himself. Unanimity actually has different weights in different parts of the country, and maybe that reflects a real sociopolitical reality and that is why it is not as dangerous as all that. It is not as if we are held to ransom by Prince Edward Island.

I just want to say, though, that because I do not want to be a hypocrite and appear to agree with you when I do not entirely, in the appendix to the submission to the joint parliamentary committee I do make a run at unanimity as a general rule and talk about the nature of national self-definition in a



federal state proceeding by way of majoritarian votes and to reflect federalism, a majority or more of the provinces.

I think that there is some possibility for national realization, self-realization, redefinition, or whatever we say, which does catch groups of people, just as in democracy minorities are minorities—groups of people, even a province, on the wrong side—and that you live with that.

Mr. Allen: Members of the committee will be happy to know that I have an engagement at 12 o'clock. But I want to get in one little inning, because I thought when you were describing the visions of language policy and the tensions and preserving the conflict and so on between various elements that are fundamental to our national existence, you were coming out exactly where I was coming out with regard to the Meech Lake accord; namely, that it did manage to preserve the tension between the bilingual model on the one hand and the distinct society concept or the necessity of a homeland language territory, if you like, which of course creates the issue in the first place, and that Meech Lake preserved it. Then I thought you said it destroyed the tension.

Dr. Whyte: Yes.

Mr. Allen: When I take Meech Lake and put it alongside the charter and the language elements of the British North America Act, 1867, I do not quite follow you on all that, because the charter, sections 16 through 23, affirms distinct language rights of particular groups. The official bilingual designation in federal terrain has marked off exactly what constitutes who has what rights with regard to the provision of language services, Ontario has followed that model in Ontario recently in Bill 8, and Meech Lake itself talks about a dualism and the necessity to preserve the dualism, which means some obligation to have a functioning public structure which responds to two languages in all parts of Canada.

I do not myself have a sense that the weight of the "distinct society" language weighs in that heavily against that, that it somehow overturns all of that drift of recent policy and pronouncement. Much of the bilingualism that happens in the country, of course, is informal decision among individuals who have recognized, families which have recognized that in order to function in our country these days, it is just important for their kids to have two languages. That is a reflection of the discrete realities of those language groups in their separateness, but the necessity of living together in a community—I sort of lost you there. I am not sure that—

Dr. Whyte: Sorry. Yes, I do think there is a tension between these two, dualism and bilingualism. I admit people make the claim about Meech Lake that it does not resolve the tension, does not come down on one side or the other, but I am clearly of the view that it does and that it is a potential weapon against bilingualist policies and so that—

Mr. Allen: How?

Dr. Whyte: That is right. It is a matter of interpreting how it is going to get worked out. The first thing I want to say is that the first clause, relating to English and French centred in some provinces and not centred in others does identify there being two language populations in each province.

The argument is that it identifies dominant languages and goes to great

lengths to describe language as a geographic phenomenon. Then the argument is that because the Meech Lake accord expresses so much concern about the geographic placement of language, it conveys the message there is an appropriate language or a dominant language in one area and another dominant language in the other area, and that there then is an obligation on provinces to preserve this, to preserve these dominant languages.

I read the first clause as identifying it to mean two languages, but doing it in a way that creates geographical dominances for languages. The next clause, relating to this idea of promoting, seems to be a suggestion that provinces are mandated to push for that language, the appropriate language. I want to admit that this is not the only logical reading. I do not even think it is actually the reading the courts will give it. I think what is bad about Meech Lake, that is, about the first clause, not the "distinct society" clause—putting that aside for a moment—is the amount of room it gives at the political level for arguing for the idea of appropriate language or the idea of the legitimacy it gives for political decisions in favour of promoting unilingualism.

It also, by the way, I think, gives legitimacy for promoting bilingualism if a province wishes to. My argument about Meech Lake is not that it attacks bilingualism when it is chosen by a province, but that it promotes unilingualism, or language dualism. It legitimates unilingualism and language dualism when politicians choose to do that. Furthermore, it could even lead judges, if they are called to assess whether this is a reasonable policy, to support those policies of unilingualism or language dualism.

The problem with Meech Lake is that it seems to lend comfort to those people who are arguing strenuously in favour of dominant languages and appropriate languages and geographically based languages.

The "distinct society" clause, I think, is different, because I think the "distinct society" clause is a clause about francophonism. This is a different point I make. I did not in fact elaborate the first subclause before. The "distinct society" clause, I think, is particularly sinister because it is a clause that compels courts to interpret powers and limitations in a way that reflects the distinct identity or the distinct quality of Quebec as the centre of francophonism in Canada and in North America. I see it having significant unilingualist thrust in its application.

Mr. Morin: Would you say that Saskatchewan is ??

Dr. Whyte: Yes. I would make the same quip others have, that the great thing about Devine is that he has caught the spirit of Meech Lake. I know it is a quip. To be more thoughtful on your question than to say, "He caught the spirit of Meech Lake," what I really am saying to you is that it is not clear what the spirit of Meech Lake is in that distinctive characteristic clause, that first subclause, but it has the real possibility of supporting those or legitimating those who say, "We have an idea here of language domination, language geography and language appropriateness, and in so far as we are reflecting that, we have got the Constitution on our side." They are saying that at a political level.

Devine maybe has not caught the spirit of Meech Lake but he used Meech Lake.

1210

Mr. Chairman: Can one not also say that what he did, he did apart from Meech Lake, and that had there been Meech Lake, it might have been much harder, if not impossible for him to do what he did? I realize there are a lot of unknowns there, but in fairness to the concept of preserving, if the accord were in effect at least in terms of that clause, would that have enabled him to do what he did?

I think your point about the spirit is a valid one in the sense that one says, "What does this mean if Devine and Bourassa sort of agreed, 'You kick your minority and I will kick mine.'" In looking at the specific action, could Devine in fact have done that had the clause been in the Constitution?

Dr. Whyte: I suppose he could have, in the sense that what he was doing was repealing section 16 of the Northwest Territories Act of 1891, or something, and the Supreme Court found that did not get constitutionalized, that it was just part of the business of internal self-management of a province.

It may be one of those instances where the clause of Meech Lake does not actually have enough power. I said earlier it has a lot of power, but maybe it does not have enough power to begin to limit the self-management powers of provinces over their official languages. Had Meech Lake been in place, would there have been a better hue and cry about it or a better claim on behalf of francophones?

I think there is a good case to be made that he is acting in accordance with Meech Lake, that francophonism gets located in Meech Lake and is no longer quite his responsibility. The thing about that, what was said by ??Stan Graham or whoever, of the dinosaurs, whatever that club—Is this rude?

Mr. Chairman: You are free to say whatever you wish within these four walls. There are no dinosaurs in this room.

Dr. Whyte: I can see that. That is why I felt—

Mr. Chairman: Maybe other animals—

Dr. Whyte: ??The one who said that they could speak English "as good as me."

The point about that is how much it misses what is going on in terms of language policy in Canada. This is not a functional claim, a claim being made because francophones in Saskatchewan, the Fransaskois, have to function. It is that French Canadians are a founding people and have a right to have their culture continue in this nation. The centre of the French Canadian population is in Quebec and they have the right to Canadian membership, which means some elements, some expressions of hospitability throughout the nation; not total elements, but some elements. ??And that an inhospitable as Alberta's rejection of French language—inhospitable messages. I think that is the kind of constitutional current that flows through bilingualism.

Following Mr. Allen's question, I could be wrong on Meech Lake, but it seems to me that it undercuts that. It seems to remove the responsibility from provincial leaders to remember that fact about Canada. It is not functional.



It is founding peoples. It is the special place of French Canadian people throughout Canada.

Mr. Chairman: I want to thank you very much for joining us this morning. As we head into our last testimony this afternoon with the Attorney General (Mr. Scott), we have received a great deal of thought and opinion. I think all the committee members would say that virtually everyone who has been before us has obviously put a great deal of himself or herself, as well as academic or intellectual interest into this. I think we have to realize that constitutions and constitution-making are real, are alive and are vital endeavours, and that somehow, out of all of this, we will have to try to reflect that in our own deliberations.

I thank you for the submission you made this morning as well as the copy of your submission in Ottawa. We appreciate you coming this morning.

Dr. Whyte: Thank you. I care about Meech Lake. I wanted an opportunity to speak to you. I know you have stayed on months longer than you meant to, not just for me, but I am grateful you have done that, for me and for others.

The committee recessed at 12:15 p.m.



7A00(1)

NR

57052

C-26b

(Printed as C-26)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, MAY 4, 1988

Afternoon Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Also taking part:

Cunningham, Dianne E. (London North PC)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witness:

From the Ministry of the Attorney General:

Scott, Hon. Ian G., Attorney General (St. George-St. David L)

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, May 4, 1988

The committee resumed at 3:35 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

Mr. Chairman: Good afternoon, ladies and gentlemen, if we can begin this afternoon's session, we welcome this afternoon the Attorney General of Ontario, the Honourable Ian Scott and we want to thank him for coming this afternoon.

This is a historic moment for the committee. It is the end of its public hearings which have now gone on for some time. We have received a copy of your brief and I wonder if I could ask you to introduce your colleagues at the table. Then if you want to take us through the brief in whatever fashion, we will follow up with questions.

Hon. Mr. Scott: With me today are, on my right, Larry Taman who is the assistant deputy attorney general for constitutional law and policy in the Ministry of the Attorney General. On my left is Professor Patrick Monahan who is on my own staff.

I want to thank the committee very much for inviting me to be here because I believe that the committee has undertaken an historic act, an act of statecraft during the course of which, I believe, the committee will speak to the whole country about our vision of Canada.

The brief I have filed I have provided to each of you. I regret that it was not filed earlier than today because I know you would want to have examined it and it would therefore have been possible to shorten my remarks. But it is before you. I think it is logically organized and I will be delighted today or on any other occasion to respond to any questions you have about it.

I would like to take you through parts of it that I regard as critically important. In the brief, what I attempt to do is to articulate the constitutional vision which underlies the Meech Lake accord. We attempt in the brief to situate the accord within Canada's unique constitutional tradition and we attempt to explain how the accord maintains that tradition and is consistent with the current practice of Canadian federalism.

The brief attempts to analyse the concerns which the committee will seek to address and measures those concerns against that unique Canadian vision of constitutionalism.

May I note first that the first section of the brief is, in one sense in my opinion, the most important part because in the first section beginning really on page 1 or page 2, we attempt to set out our vision and our placement of the accord in the Canadian constitutional tradition. Then later on in the brief, of course, we begin a detailed examination of the individual clauses and an analysis of some of the key issues which I know have been read, much of the evidence before you having been presented to you by our citizens or which

you have raised in the course of questioning.

First of all, any attempt to identify the constitutional vision underlying the Meech Lake accord must be informed by a sense of constitutional history and grounded in an appreciation of the current practice and reality of Canadian federalism. The accord represents a set of changes which builds upon the Canadian political tradition.

It has been claimed that the document is radical or revolutionary. The committee will wish to assess the impact of the accord on the power of the federal government to formulate and implement national policy. Is there a devolution of power to the provinces? Does the accord confer unspecified but important new powers on Quebec? Does the Charter of Rights and Freedoms still apply in Quebec after the accord?

In addressing these concerns, it is important, I believe, to begin with the historical context, and in particular with the efforts over the past 30 years to update and revise the original Canadian Constitution, as defined in the British North America Act of 1867.

And as you know, until 1982 our Constitution was an act of the British Parliament. Since the mid-1960s, there has been consensus on the need to modernize the Canadian Constitution. It was generally agreed that there had to be some sort of readjustment in the division of powers so as to provide greater scope for provincial autonomy and distinctiveness, particularly the distinctiveness of the province of Quebec. Limits on the federal spending power, the provincial role in the appointment of Supreme Court judges and senators, and opting out of shared-cost programs were all the subject of detailed constitutional proposals by both the federal and provincial governments in the 1970s, if not earlier. Most of these proposals, including those advanced by the federal government prior to 1981, would have established a far greater role for provincial governments than is provided for in the Meech Lake accord itself.

By 1981, agreement on wide-ranging constitutional reform had proved impossible, notwithstanding almost a generation of effort. Attention was, therefore, in 1981, focused on the need to bring the Constitution home to Canada and to give Canadians a Charter of Rights and Freedoms.

While these matters were successfully dealt with in the constitutional amendments of 1982, there was at that time little progress on dealing with the agenda of Quebec and of the other provinces in calling for renewal and revision of the federal-provincial division of powers.

The Meech Lake accord deals successfully with some of what was not achieved in 1982. It deals with the agenda of Quebec. For the first time, Ontario and the rest of the country have an answer to the question: "What does Quebec want?" What is striking about the answer, in my opinion, is its limited focus and modest character. The answer of Quebec eschews radical change in favour of incremental adjustments to current constitutional practice.

First, the Meech Lake accord does not require any changes in the division of powers between the federal government and the provinces. The federal Parliament retains all of its legislative powers. In fact, the "distinct society" clause, which has been the focus of a great deal of criticism, explicitly provides that it does not limit the powers of Parliament or the provincial legislatures.



Indeed, far from representing a radical innovation, the Meech Lake accord largely affirms existing practice or formally writes into the Constitution provisions on which there has been widespread agreement. It has long been accepted, for example, that there should be some provincial role in the appointment of Supreme Court judges and senators. In terms of the amending formula, until 1982 it was widely believed that unanimity was required for any amendment affecting provincial powers. Opting out of shared cost programs and provincial variations in their delivery have been central features of the exercise of the federal spending power at least since the 1960s.

Finally, the recognition of the distinctiveness of Quebec has been a cornerstone of both our political practice and our constitutional law since the Quebec Act of 1774. One need only look to the special provisions dealing with the province of Quebec in the British North America Act of 1867 to grasp the fundamental way in which the distinctiveness of Quebec has, for all our history, shaped our constitutional tradition.

The novelty of Meech Lake and its likely impact on Canadian politics could therefore easily be exaggerated. Predictions of dire consequences, in my opinion, would lack a sense of balance and of proportion, and they would fail to situate these proposals within the larger history of constitutional reform over the past 25 years.

I believe the accord represents a set of changes which have been the subject of widespread debate and examination in this country for two decades. The likely impact of the changes is circumscribed and measureable, and in large part the accord constitutionalizes existing practices or builds on previous constitutional proposals for which there has historically been widespread support.

I think the next point is an important one to make in the light of the submissions you have heard and your own inquiries of witnesses.

We must remember that constitutions differ in a fundamental way from ordinary legislation. Constitutions are not intended to settle, once and for all, the outcomes of political disputes. Rather, constitutions are designed to establish a general framework within which the art of politics can be practised and fostered within a community. This commitment, I am sure, is mindful of the reality that once constitutions are settled, politics continues.

Similarly—and this is very important in my view—constitutions are not intended to freeze into place any single vision of the nature of the country. Instead, constitutions give expression to competing visions as to the nature of the country and establish the conditions for future conflict resolution. Constitutions historically, across the world, to be successful and enduring in a nation such as ours, must be pluralistic. They must be capable of accommodating the differences of geography, custom, language, ethnicity and belief which exist in any political community, and certainly in a diverse country like our own.

Look, for example, at the British-North America Act. Some see in the document a vision of Canada as a unitary state. It is perhaps possible that Sir John A. MacDonald saw the BNA Act in that way. Others, perhaps Etienne Cartier, saw the BNA Act as built upon the ideal of Canada as a truly federal state with provincial governments standing on an equal footing with the central government.

The reality is that the BNA Act expressed both of these competing

conceptions of the nature of the country. This indeed was the very genius of the document. Its longevity and success was a function of the fact that it was sufficiently flexible to allow for conflicts over the nature of the country to be worked out over time and according to the circumstances and demands of the day. It did not seek to freeze a particular ideal of the country into the Constitution and impose it for all time on those who held to a different vision.

This constitutional vision of pluralism and accommodation is, I believe, the vision of Meech Lake. The accord does not purport to settle for future generations the ongoing debates about the nature of the country. Rather than seeking a futile once-and-for-all settlement of fundamental questions, the accord provides a space within which politics can continue with civility and mutual respect. It sees politics as a continuing exercise in finding compromise and building trust. It rejects polarization and tests of strength.

The accord's treatment of the language issue exemplifies this attempt to accommodate competing ideals. The language issue in this country over the past three decades, if not longer, has involved conflict between two fundamentally different views of the nature of the country. One view has emphasized linguistic equality and the guarantee of minority language rights across the country. The contrasting view has focused on the distinctiveness of Quebec and the need for the French-speaking majority in that province to protect and express its linguistic and cultural identity.

#### 1550

Meech Lake recognizes the distinctiveness of Quebec society and the role of the government of Quebec in promoting that distinctiveness. But the accord—and this is critical—also recognizes the presence of the English-language minority in Quebec and the French-language minorities in the other provinces, and affirms the constitutional obligation of all governments, including the government of Quebec, to preserve those minorities. The accord also gives expression to the fundamental equality of all the provinces by ensuring that the distinct identity of Quebec does not alter the division of powers. Moreover, the signing of the Meech Lake accord by the government of Quebec affirms the legitimacy within that province of the minority language guarantees contained in the Charter of Rights.

These provisions exemplify the constitutional vision of Meech Lake. It is an approach which seeks to avoid confrontation and polarization and places a premium on accommodation and mutual respect. It affirms the desirability of each side in a dispute gaining half a loaf as opposed to one side going home empty-handed.

A second illustration of this spirit of pluralism and compromise is the way in which Meech Lake deals with the struggle between central and provincial interests in the country. As with the language issue, this struggle has revolved around two competing ideals of the nature of the country. On the one hand are those who see Canada as a single national community comprised of individual citizens requiring universal, uniform and efficient services. On the other are those who tend to see provincial communities as basic points of reference, and want national policy to respect and balance regional interests.

Meech Lake refuses to exclude either of these possibilities. Instead, what it seeks are processes through which the ongoing debate between these two contrasting ideals, both of which are Canadian, can be carried on.

The accord provides provinces with the right to nominate Supreme Court judges and senators, but in each case provides the federal government with the final say in any such appointments.

The accord provides for the possibility of immigration agreements between the federal government and individual provinces, but reserves the final say on immigration policy to the federal government.

The accord expands the class of amendments requiring unanimous consent, but in no case can either government unilaterally force the hand of the other. A balance of power is established in which agreement and compromise are required before action can be taken.

The accord establishes a framework in which future differences between the federal and provincial governments can be resolved. No specific outcome is dictated by the Constitution. No single man's vision is imposed on any other. Instead, the outcomes will depend on the political will of the parties and the particular circumstances and pressures of the period in which they arise.

One of the frequent complaints—reading your debates—about these proposals is that they do not foreclose the possibility that provincial governments might some day abuse their powers. For example, a separatist government of Quebec, it is said, might try to use its role in the appointment of Supreme Court justices to appoint a separatist to the Supreme Court.

It is, of course, true that any government, either federal or provincial, might some day try to abuse its constitutional powers. There are no words that can be written into the Constitution to preclude conclusively the possibility of such abuses, nor have there been in the 125 years of our history. The outcomes of such struggles will not turn on the wording of particular provisions in the Constitution. They will instead depend, as they always have in this country, on the political will of the respective governments and the support which they can muster for their proposals in the community.

This point can be brought home most vividly by a comparison of the Canadian and American Constitutions. A straightforward reading of the two documents might suggest that Canada ought to be more centralized than the United States, if you just looked at the documents. The fact that the opposite is in fact the case illustrates the limited role of constitutional wording in predetermining long-term political outcomes.

Meech Lake's attempt to balance and accommodate different legitimate visions of the country may prove troubling to those who look to the Constitution for a once-and-for-all and wholly favourable resolution of their particular concern. But the Constitution cannot and should not enshrine a single vision of the country to the exclusion of all others. I believe that when we get historic perspective on this we will see that Meech Lake stands in the tradition of Laurier, Mackenzie King and Lester Pearson in striking a reasonable balance among contradictory ideals or visions. It refuses to identify unity with uniformity.

The Meech Lake accord provides a way of purging the Canadian Constitution of what Stefan Dupre, in his testimony before this committee, termed a "symbolic monstrosity." This symbolic monstrosity is the fact that the Constitution Act of 1982 was imposed on Quebec without its consent.

During the referendum campaign, the people of Quebec were promised that



in return for a no vote, Canadian federalism would be renewed. But the constitutional settlement of 1982 addressed none of Quebec's historic concerns. Equality rights, multiculturalism, aboriginal rights and minority-language education were then given constitutional recognition. Only Quebec's concerns in 1982 were left out.

Most important of all, for the first time in Canadian history, through the limiting effect of the Charter of Rights and Freedoms, the powers of a province had been reduced without its consent. Of course, the Constitution of 1982 was legally binding in Quebec, and this was precisely the problem. The circumstances surrounding the patriation of the Constitution in 1982 made it a national imperative to secure Quebec's voluntary adherence to our Canadian Constitution.

Meech Lake secures Quebec's adherence on the basis of proposals that are moderate and modest compared to most advanced by a Quebec government in the past 30 years. The Meech Lake accord, I believe, represents the very minimum that would be acceptable to any conceivable Quebec government in return for its acceptance of the Constitution.

I believe that one basic and simple question which confronts this committee and the people of Ontario is: Are we now prepared to say yes to Quebec? Are we prepared to accept the fact that a francophone space exists within Canada and that it is a permanent and essential feature of our constitutional fabric?

Some may say that they welcome Quebec's adherence to the Constitution but they merely want better terms. But in order for this answer to be credible at the end of the day, it must be accompanied by an explanation of what those better terms are and whether they would adequately accommodate Quebec's concerns. Moreover, it must explain how these better terms are to be arrived at without disturbing the fragile consensus which has already been achieved.

I understand, and I have had the advantage of reading much of what has been said before you, many of the concerns which have been raised. Yet the accord represents a complex, very delicate series of tradeoffs among a number of governments after more than 20 years of negotiation. It permits us to take a modest step forward in the job of nation-building. I am not persuaded that the changes proposed can be made without disturbing that fragile agreement.

I am well aware of the fact that reservations about the accord have been expressed in other provinces. What I ask, respectfully, is that this committee approach its task on the merits and without regard to the fate of the accord elsewhere. I ask the committee to consider any faults it might find in the accord within the context of the overriding objective of national reconciliation and the constitutional morality which underlies it. I remind the committee that the accord is not the end of Canadian constitution-making, any more than 1982 was the end of Canadian constitution-making. But it is a key middle part, without which, in my view, there is little reason to be optimistic about further progress on the constitutional agenda.

1600

As briefly as I can, I would like to turn now, at page 14, to the first clause of the accord, which is the "distinct society" clause.

The first element of significance in this clause is clause 2(1)(a), which refers to the presence of "French-speaking Canadians, centred in Quebec

but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec." It is this that is said to be a "fundamental characteristic of Canada."

This clause should be compared with the original Meech Lake language which referred to the existence of French-speaking Canada and English-speaking Canada as being a fundamental characteristic of Canada. The language of the original Meech Lake agreement suggested that Canada consisted of two separate collectivities, one French-speaking, the other English-speaking. The implication perhaps was that Canada consisted of two founding nations, the English and the French. This language constituted a potential threat to Canadians whose origins are neither French nor English, as well as to the aboriginal peoples of Canada, who also consider themselves to be a founding people.

In the Langevin text, on the other hand, the reference to two Canadas was dropped and replaced by a reference to the existence of English-speaking and French-speaking Canadians. This negates the implication that we can be fully described in terms of two founding collectivities, while at the same time affirming the importance for constitutional interpretation of the presence of French and English speakers.

The two-nations implication, if any, of the original Meech Lake wording was further negated by the addition of section 16 of the accord. This provides that section 2 does not affect the aboriginal peoples sections of the Constitution Act, 1982; section 91, class 24, of the Constitution Act, 1867; or the multicultural heritage clause of the charter.

Section 16 is extremely significant and has figured in a major way in the submissions before you. It suggests that the recognition of the distinct society of Quebec should not be taken to suggest that there is only one collectivity in Quebec or that Quebec society should be defined as francophone. Section 16 emphasizes that the interpretation of the Constitution and of Quebec's role in Canada should be guided by the idea of cultural and ethnic diversity that is already recognized in the Constitution.

Clause 2(1)(b) of the proposed amendment states that "Quebec constitutes within Canada a distinct society." It is important to emphasize that clause 2(1)(b) states that the "distinct society" of Quebec exists "within Canada." This means that the "distinct identity of Quebec" must include the presence of the anglophone minority. Indeed, the presence of English-speaking Canadians within Quebec, as I have pointed out, is declared to be a "fundamental characteristic of Canada."

Subsections 2(2) and 2(3) refer to the role of Parliament and the legislatures with respect to the "fundamental characteristic of Canada" and the "distinct identity of Quebec." It has been noted that the Parliament of Canada and the provinces are stated to have a role of preserving the "fundamental characteristic of Canada," while the government of Quebec has the responsibility to "preserve and promote the distinct identity of Quebec." But the duty "to preserve the fundamental characteristic of Canada" should not be taken to suggest that governments are instructed to adopt a passive stance with respect to protecting linguistic minorities.

At the present time, the federal government is officially bilingual and has a long-standing policy of encouraging public officials to become bilingual. The federal government has also undertaken extensive programs of promoting second-language education across Canada. The Parliament has

aggressively promoted the rights of the French minority across Canada. The role of the Parliament of Canada in preserving the "fundamental characteristic of Canada" will include continuation and development of the policies already undertaken at the federal level.

Now if I can take you to page 35, I would like to deal very briefly with shared-cost programs.

The proposed section 106A will create new constitutional norms for the creation and operation of shared-cost programs. Its application, it is important to note, is limited to new programs within the area of exclusive provincial jurisdiction.

Shared-cost programs between the provincial and federal governments have been in existence since 1907. These programs represent one of the three ways in which the federal government exercises its spending power. The first is unconditional federal payments or grants to the provinces, generally in the form of equalization payments. The second is direct federal payments to persons or institutions, for example, universities, which bypass the provincial governments. Neither of these spending power techniques is affected one whit by section 106A. The third is conditional federal grants in areas of exclusive provincial jurisdiction, where the transfer of funds is made on condition that the provinces use the funds in accordance with specific stipulations imposed by the federal government.

A full and fair description of the present state of shared-cost programs, in their constitutional and administrative context, is provided by Professor Hogg in his textbook, and I understand he gave evidence to the same effect before you.

In the text, he says: "Shared-cost programs have assured all Canadians a high minimum level of some important social services. Without the federal initiative, and the federal sharing of the costs, it is certain that some at least of these services would have come later, at standards which varied from province to province, and not at all in some provinces. But the programs have effected a substantial shift in the distribution of power within Confederation. Since the provinces bear half the cost of most programs, each province is now committed to substantial expenditures for purposes which have been selected not by the province which raised the money but by the federal government. Indeed cost sharing locks more than one-third of provincial budgets outside the normal provincial processes of priority setting and budgetary control. Thus," Professor Hogg says, "shared-cost programs are pursued at the expense of provincial functions for which no federal assistance is available."

Section 106A gives express constitutional recognition to the federal government's capacity to impose conditions on the provinces when it spends in areas of exclusive provincial jurisdiction. The federal government will, when establishing such programs, set national objectives. At the same time, a province's entitlement to compensation, if it establishes a compatible program, has been constitutionalized. In this way, the provinces will be able to ensure that such programs are sensitive to local and provincial needs.

I have set out elsewhere in the brief an analysis, sometimes at more length than I would normally want to do, of other sections of the accord to which I will ask you to refer in the course of your reading.



1610

I would just like to make one or two observations to sum up before your questions. When this resolution came before the Legislature for debate on the motion to establish this committee, I suggested three criteria which the committee might find useful in assessing possible flaws in the accord. Permit me just to repeat those three questions.

1. How serious is the alleged flaw?
2. Must the flaw be corrected immediately, or is it possible that the problem can be corrected at some future time, possibly by including it on the agenda for immediate attention by first ministers at the 1988 first ministers' conference?
3. Is the harm identified so significant that it would justify putting at risk the broad consensus we have achieved in pursuit of the overriding objective of national reconciliation?

I have reviewed very carefully the testimony before the select committee in light of these criteria and in light of the overriding objective of national reconciliation. It is my best judgement as Attorney General that the concerns which have been raised do not justify re-opening the accord for amendment.

The Meech Lake accord, I believe history will record, to be a fundamentally sound constitutional document. It represents a modest and limited set of reforms which does not alter in any fundamental way the balance of power between provinces and the federal government. The accord resolves, in a reasonable and balanced fashion, issues that have been widely debated and exhaustively analysed over a 20-year period. It reflects a constitutional ethic of pluralism and mutual respect, while rejecting the values of confrontation and polarization which characterized so many of the constitutional discussions of the past generation.

This does not mean that the accord is perfect. But I am not satisfied that any shortcomings are so serious as to require immediate amendment of the accord. Indeed, many of the concerns which have been raised before the committee have less to do with the Meech Lake accord and more with the shortcomings of the 1982 package of constitutional amendments.

Some witnesses, for example, argued that the "notwithstanding" clause should be removed from the charter. Others complained that there had been inadequate protection for the rights of multicultural groups in the Constitution. Still others argued that there is a need for a constitutional amendment dealing with the concerns of aboriginal people. All of these concerns are important and certainly merit full and open discussion. But in my respectful opinion, they do not constitute a reason to postpone ratification of the accord in its present form.

I am mindful, and I deal with it in the brief, of the fact that a good deal of the concern surrounding the accord is related to concern about the process which preceded it. I believe your committee can play an important role in helping to improve that process in the future. Your suggestions as to how members of the public can be involved at an earlier stage in the formulation of constitutional proposals will be of great service, not only to this government but to all citizens of the province and all future governments.

Constitutions, like the societies which produce them, are fluid and evolutionary. The Meech Lake accord is not the final word on nation-building in this country, but by approving it, Ontario will be signalling its willingness to continue the journey rather than prematurely end it.

In 1927, one Canadian leader, not regarded everywhere as a hero but regarded as a hero by me, Mackenzie King, a man who held this country together for periods of time over 50 years when it was stressed more aggressively than it has ever been stressed in terms of national unity, described the delicate balance between unity and diversity in Canada in these words: "Today we are a united people, seeking first and foremost an enduring unity; not a unity which aims at uniformity, but a unity which delights in diversity."

Canada remains united, and this unity endures in 1988, some 61 years after those words were spoken, precisely because of the tradition of pluralism, generosity and accommodation practised by enlightened Canadian political leaders such as Mackenzie King, Laurier, Pearson and their opposite numbers in other political parties. It is a tradition which cherishes unity while at the same time welcoming diversity.

I invite this committee to play its part in the historic task of nation-building—there will probably not in a generation be a more historic vote than the one you take—by endorsing the Meech Lake accord and welcoming our brothers and sisters in Quebec back into the Canadian Constitution with honour and enthusiasm.

That was a little long, but I feel strongly about this issue. I wanted to give you, for what it is worth, the advantage of my views and I would be delighted to respond to any questions or observations you might want to make.

Mr. Chairman: Thank you very much, Mr. Scott, and thank you for the brief. As you noted, it does touch on all aspects of the accord, and we will have occasion to read that. I think we probably have enough material now to read to keep us going for some time.

I was tempted, when you mentioned Mackenzie King, to ask if you might put some questions to him the next time you are talking with him. That might be of—

Hon. Mr. Scott: I would be delighted to but I do not think I have the power that he apparently had.

Mr. Chairman: We will turn then to questions and begin with Mr. Allen.

Mr. Allen: We have indeed been seized by the importance of the issue that has been before the committee, as you will realize, and I think it has been evidenced in the willingness of the committee to listen at great length and not to cut off any person who has come before us unduly or before he said his piece. I think the Ontario committee in that respect has played a very significant role in the national debate on this question.

At the same time, you will be aware that although you have indicated that there is no rejection of any man's vision and no precedence given to any other man's vision with respect to the Meech Lake accord, none the less there have been those who have come before us who have insisted that indeed there is a vision accepted and a vision rejected in this document. As late as this morning, the dean of law from Queen's University felt that there was indeed an

explicit two-Canada vision that was still very prominent in the document.

I noted also that you referred to the tradition of Laurier, Mackenzie King and Pearson. At the same time, that clearly excluded Macdonald and a few other players on the national scene, including one of our more recent prime ministers, Mr. Trudeau.

I ask you the question about the vision a little bit further because I would like your further comments. It was clear when we went through the great crisis of the 1930s that we had to retrieve a vision that had been lost at one point in our past, namely, the Macdonald vision, in order to somehow gear up the nation for some major new nation-building undertakings that the Depression obviously placed before the country, and it had been true that vision had got lost in time in significant measure. The people, of course, who have been most critical of the Meech Lake accord have been those who have said it is precisely that more central view of the nation that in these perilous times also needs to be maintained.

I wonder if you could comment on how the Meech Lake accord, in your sense of not endorsing any single vision, somehow manages to include sufficient central power to cope with more than just national emergency—because that was the old interpretation of peace, order and good government, just in national emergencies—but at the same time meets the conditions of what I guess I would view as the more traditional Liberal understanding of the Constitution in a more decentralized fashion.

Hon. Mr. Scott: First of all, there have always been in this country two visions at least of the way in which the country should develop. There were two views in 1867. There was the unitary view of Sir John Macdonald and there was the strict, almost American federalist, view of Etienne Cartier and his colleagues. If either of them had sought to impose a constitutional vision on the other, you only have to read the debates to know that there would never have been a Canada; there would have been no British North America Act.

The process of creating that Constitution was one that expressed the sense of the nation and allowed those competing views of its political future to be shaped within the context of the Constitution by the political process, and there have been times traditionally when one view has been regarded as more important than another. You pointed to such a time in the 1930s when it might be that one view took pre-eminence over the other.

#### 1620

The first point I make is that any Constitution in a country which has two or more views about its nationhood will fail if it excludes only the vision of one of those groups, because it will not take account of national needs. Now, is there sufficient federal power? I think the point we try to make in our brief is that there is. There is no significant diminution of federal power.

What we have with respect to shared-cost programs is a constitutional reference to the reality of at least the last generation and we will be in the same position in constitutional terms as we have been in practical terms at least since the 1960s, if not earlier. So I do not see a significant prospect that any court will find the authority of the federal government to be reduced. Indeed, it can be said—I do not put too much stress on it—that this accord incorporates for the first time in the Constitution a recognition of



the capacity of the federal government to spend money on shared-cost programs in areas of provincial jurisdiction.

It is an issue that, as you know well, is already the subject of a court case which would have been decided pre-accord, in which it is argued by the Canadian Medical Association, I believe, that the existing Constitution of the country does not permit the federal government to spend dollars on programs in the way it now does by imposing conditions on provinces. I do not know that there was necessarily much to fear about that case perhaps, but certainly the accord enshrines for the first time the federal capacity to do that. So I do not have the reservation that Professor Whyte, whose evidence of course I have not yet read, seems to advance.

Mr. Allen: Could I turn to a somewhat more specific question? In your own presentation, you slipped over several sections and we will go back and look at those in some detail. But I think for the purposes of our discussion this afternoon it would be helpful to have you respond to the gender equality question for the committee.

You have indicated that it was important in the light of the "distinct society" statement to make it quite clear that aboriginal groups and multicultural groups were not precluded in the interpretation of that clause and that the distinct society was not simply a society of French-speaking people whose interests were to be promoted.

We have, of course, had a good deal of testimony which has stated that, just as those items were put in for good measure and for greater certainty on that point, it would also have been not just useful but even necessary to include section 28 on gender equality, to make it quite clear that there would not be any repercussions for women in the interpretation of the "distinct society" clause and the affirmation of the French traditions in Quebec in terms of programs, resources and so on that would be devoted to that cause which might otherwise be diverted from programs on behalf of women and so on. You are familiar, I am sure, with the argument.

In connection with that, perhaps you would reflect for us, because it is a related issue, on whether section 16 does not indeed set up a hierarchy of rights and whether, if one is going to go that route, it would not be better to simply reaffirm the charter as a whole at that point in the accord in relationship to the entire accord, rather than to isolate some part of the rights that are in the accord in the charter itself.

Hon. Mr. Scott: Let me begin by saying, and it is not special pleading, that in 1982 I did not hesitate to promptly support the women of Canada when they complained that gender equality had been left out of the negotiations that were then proceeding. I would not hesitate to say so now if I thought there was any risk to gender equality in what is proposed in the Meech Lake accord.

I understand very much the concerns. Women have worked enormously hard in Canada to achieve under our Constitution what exists in almost no constitution in the world, certainly not in the Constitution of the United States: a recognition of gender equality. We have to assess very carefully whether the concerns are warranted in constitutional terms.

The first thing to observe is this: What connection is there between the distinctiveness of Quebec society and gender equality? Because if there is no nexus between them, the principles will not compete, and it has to be the

competition of those principles that will lead, if anything will, to the reduction of the equality principle. So to what extent is there a nexus between the distinctiveness of Quebec and gender equality? In terms of that, what was the purpose of section 16?

First, the reading of the whole document makes perfectly plain, if there was any doubt about it, that the distinctiveness of Quebec is a linguistic or a cultural phenomenon. In gender terms, there is nothing distinctive about Quebec. The distinctiveness of Quebec—it is recited and is historical fact—is linguistic and cultural.

In that context, one asks, "Well, now, are there other cultural or linguistic groups who may feel that the distinct society provides a nexus with their concern?" And there obviously are: aboriginal groups and multicultural groups for whom language and cultural sense is a value. That is why section 16 exists.

How is the accord going to work in fact? It seems to me that the issue about which women are concerned will arise, first, when Quebec enacts a law that discriminates against women for the purposes of the sections in the charter, because if there is no discrimination in the act, the charter does not come into play at all. So the first requirement of this notional Quebec law will be that it discriminates on a gender basis. If it does not, the charter does not apply now.

If it discriminates on a gender basis, it will fall unless it is saved by section 1 and the "distinct society" provision, and the courts are grappling with the kinds of collective decisions that may be justified even though they may involve discrimination of one kind or another.

The test of section 1 is: "What is justifiable in a free and democratic society?" When the courts find a law discriminatory on its face coming from Quebec, they will ask if, notwithstanding the discrimination, it is justifiable in a free and democratic society. What do they do now? They say there are, in a free and democratic society, a wide number of considerations which they may take into account in sustaining a collective law even though it discriminates.

Last week, the Supreme Court of Canada decided that the desirability of road safety under section 1 of the charter was sufficient to justify, to permit, a discriminatory act. So, under section 1, a wide variety of things can be taken into account in justifying an enactment. I presume that in the case of a law in Quebec, efforts will be made, as under the present regime before Meech Lake, to advance that the law is necessary on the ground of public safety, road safety or what have you.

1630

There are two more steps in this process. The first step is that the courts have already been taking into account the distinctiveness of Quebec in that very process. The language case in the Quebec Court of Appeal and I think one other case said that in a free and democratic society, in determining whether a discriminatory law can be justified by section 1, by the test of what is appropriate in a free and democratic society, we will take into account the distinctiveness of Quebec, its linguistic and cultural distinctiveness. That is all Meech Lake does. In effect, it incorporates what

at least the Quebec Court of Appeal, which is a federally appointed court, by the way, has been doing, historically, since the charter was passed.

How does that play with respect to the very legitimate concerns of women? First, if we are going to grapple with this in intellectual terms, you have to predicate a Quebec law that will discriminate on a gender basis against women. You then have to ask, "Would that law be sustained as reasonable and justified in a free and democratic society under section 1?" That is the process we now undergo. In looking at that, you shall consider, among all the other factors including road safety and public health and so on, the distinctiveness of Quebec.

The difficulty I have, even having read Ms. Eberts's submission, is that I have never yet seen an argument which is founded even on a hypothetical case that makes that point. The single example that Ms. Eberts gave, and she gave it very tentatively for reasons I understand and respect, it seems to me does not present a charter issue at all. The difficulty I have, and I must be candid about it, is that while I understand the concerns and I think we must grapple with them, I do not believe there is any nexus between the distinct society and gender. There is nothing, as far as I can see, and I cannot imagine a court concluding that the distinctiveness of Quebec was connected in any way with gender, any more than it is connected in any way with whether you are handicapped, or black or white. Black or white may be a stronger case.

Then, of course, many people say: "If you are so certain, why don't you just include it in section 16? Why not just put it beyond doubt and add a reference to the gender equality provisions?" It seems to me that if you do that, you create the sense that the distinctiveness of Quebec may extend beyond linguistic and cultural concerns, because you have implied, by adding gender, that the distinctiveness of Quebec is in some fashion connected with gender; otherwise, that would not be necessary. If you start on that route, why do you not add in the handicapped and a wide variety of other groups?

Frankly, I must say that I have the same difficulty in making a nexus between the distinctiveness in Quebec society and gender as I have between making the connection or nexus between the distinct society and the handicapped. It is the same issue, and I believe at the end of the day that there is no risk to gender equality in this accord. I am dependent, really, on the analysis of Professor Lederman and Professor Hogg and others for that view.

Mr. Allen: Towards the end of your answer, you really began to get into the other dimension of the argument, which has been supported by no less a person than Raj Anand, Ontario human rights commissioner, that apart from the "distinct society" question—and I certainly follow you on that line of argument—on the nexus issue, one would have to predicate a Quebec that somehow became somewhat distinctively antifemale, or distinctively antihandicapped, or distinctively anti-seniors, in order to sort of make those connections. That is a problem; it is something that I do not anticipate, even though equality in Quebec is not totally accomplished, any more than it is in Ontario, for women.

With respect to having isolated two groups that frequently can be subject to discrimination—namely, the ethnic community and the aboriginal community—in section 16, it is argued that in constitutional terms one does elevate those discriminatory items from a whole series of items that are in section 15 of the charter in particular and elsewhere in our Constitution and therefore say that somehow those specific groups merit more attention than the others in any of our discriminatory lists. That, by implication, of course, again excludes women.



That raises the question of the appropriateness, in your view, of the argument of hierarchy of rights and whether that is established by section 16 and, secondly, the question of whether, as your final remarks seem to indicate, if one were going to take the "for greater certainty" approach, there could be some wisdom in simply writing in a reaffirmation of the charter at that point in the accord rather than getting into singling out any groups in particular.

Hon. Mr. Scott: Let me deal with the second point first. The purpose of the "distinct society" clause is to entitle our courts to take into account and indeed to require them, where appropriate, at least to examine the distinct nature of Quebec society as a ground. Let us get one point out of the way. The court is not going to say, "It's a distinct society; therefore, a law we would have knocked out is sustained." The courts have made perfectly clear—and there is no reason why it should change; certainly nothing in the courts will require to be changed—that when you have a discriminatory law, before you can justify it under section 1 or section 1 plus the "distinct society," they are going to impose a very strict reading of that vindicating language. In other words, it is not every law that is going to be saved under section 1, with or without "distinct society."

The courts have been very clear that a discriminatory law can only be validated when the limitation is very strictly applied. They have required that the law, to be vindicated when it discriminates, must meet an important public objective—not any old law: an important public objective. They go on to say that before you can vindicate a law that has an important public objective, the burden is on the government to demonstrate that the law is reasonable, that it impairs the right of the citizen in the most modest and proportional way possible and that it is carefully designed to respond to a social problem.

We begin with the proposition that when a Legislature passes a discriminatory law, the burden on a government to sustain it under section 1 is a very, very heavy burden, in which a wide variety of factors may be considered. One of them in respect of Quebec laws, if the accord is passed, will be the distinctness of Quebec society. That is a ground that the Quebec Court of Appeal has already used. The proof of the relevance of that to sustain the law will require it to meet the same very stringent and complex tests that the court has used in all the charter cases. Therefore, I think the context in which this is taking place has to be clearly understood. We are not here giving some kind of laissez-faire to any Quebec law. We are simply saying that this factor, in addition to road safety, public health and a variety of other matters, is relevant if its relevance is proved and demonstrated and if indeed the impairment of a right is required by the problem and the response to the problem is proportionate.

1640

To turn to the first question, the hierarchy of rights is an American constitutional principle. There is nothing wrong with that, but as far as I am aware, it has never been a principle applied in Canada. That is not to say it will not be; that is simply to say that it has to be carefully examined before we start asserting that hierarchy of rights has come to Canada.

I tried to deal with that at page 27 of the brief. Let me just read that, because in my view what I say is quite critical.

We do not believe that section 16 creates a hierarchy of rights. I think

the difficulty is a misconception about what the charter provisions, sections 25 and 27, in fact do. The two charter provisions that are referred to by, I think, Professor MacKinnon in the hierarchy of rights case argument are sections 25 and 27. They do not guarantee substantive rights. They are provisions which are intended to aid in the interpretation of those rights which are guaranteed by the charter.

Section 25 of the charter does not grant aboriginal rights. It is not a grant of power. Rather, it guarantees that the rest of the charter will not be construed so as to abrogate or derogate from any aboriginal or treaty rights.

Section 16 of the accord ensures that this constitutional position, now in place, remains unaffected by anything done at Meech Lake. Aboriginal and treaty rights are recognized and affirmed in section 35 of the Constitution Act, which is not part of the charter.

Frankly, I have some difficulty understanding how the hierarchy of rights theory will be constructed, bearing in mind the way rights are created with respect to our people and the meaning of that section.

Mr. Allen: OK. I will stand down my other question for the moment. Thank you, Mr. Chairman, for your indulgence.

Mr. Chairman: You will get a chance to get back later. Mr. Eves and then Mr. Cordiano.

Mr. Eves: I want to thank the Attorney General for appearing here today. I think a lot of the viewpoints put forward in his brief are going to be very helpful to the committee in its deliberations.

I must say that I understand where you are coming from with respect to section 16. I wanted to deal with section 16. My colleague Dr. Allen has dealt with many of the points that I wanted to raise.

We have had witnesses, as I am sure you are aware, appearing before this committee, suggesting everything from eliminating section 16 in its entirety to amending section 16 to protect all rights under the charter. We have had people appearing before the committee suggesting that in their opinion indeed it does create a hierarchy of rights. You have just addressed that point.

I understand your argument with respect to the purpose of section 16 and what it does and the difference between interpretative rights and substantive rights.

I guess the only point I want to express is that there is a significant and fairly well informed body of opinion on the other side of the issue. That includes such well-recognized and notable individuals as Morris Manning and Professor Beverley Baines. I guess their point to the committee is that in their opinion there is at least some ambiguity as to how section 16 can be interpreted and whether these are in fact substantive rights or interpretative rights, and there is at least some ambiguity as to whether or not in fact it creates a hierarchy of rights.

Their very simple question to this committee—and I put it to you—is, having regard to all the above, why not try to clarify that ambiguity either through amendment or, if that is not possible, through a court reference with respect to section 16?

Hon. Mr. Scott: First of all, you do not have to take my judgement and weigh it against the judgement of others. I do not say how you are going to do that. I simply say that a judgement has to be made.

It is very attractive to say, "Well, why don't we clarify it?" But clarifying it presumes there is a problem that can be identified, the sting or impact of which you want to remove. If there is no problem, of what should clarification consist?

You may say: "That is very simple. We will just clarify that nothing affects gender equality." If you were to say, for example, that nothing in "distinct society" affected gender equality, you would, I think, be beginning to give a larger concept to "distinct society" than it is entitled to have, because you would have written into your Constitution an exclusion.

It seems to me the judges would say: "We thought we knew what 'distinct society' meant. It meant linguistic and cultural values that are represented in Canada. The governments of Canada obviously thought it meant something broader, bigger and more important than that, because they told us it did not affect gender rights." Then you are building in an expansion of the "distinct society" provision by inviting the court to say, "Look, the governments must have intended that this phrase meant more, standing alone, than anybody ever thought."

So there is a risk—and I think it is a significant risk—to responding in the very attractive way you suggest. Are you then going to build in an exclusion for the handicapped? Are you then going to build in an exclusion for a wide variety of other groups who may be, at one time or another, the victims of discrimination? When you start building in where there is no impact, you are creating a sense that the notion is larger than I believe it to be and you are engaged in an exercise which almost knows no limit. That, it seems to me, is the danger implicit in what looks like a very simple solution.

The second question you asked me is, "Why do we not refer it to the court?" The problem is, what would you refer to the court? The issue that is going to be presented is going to be an issue that is presented when a Quebec law is passed which discriminates against women for the purposes of section 15 and then has to be justified under section 1. Add on "distinct society." The court, in the balancing act between a discriminatory act against women and the collective interests of the community which will justify discriminatory laws under section 1, has to have something before it.

We just had a test of the Reduce Impaired Driving Everywhere program law, which is discriminatory but which was justified under section 1. The court had before it the very law, had the public policy that gave support to the law and had examples of how that law discriminated and made the balancing act.

How would you do that now when we do not have any such law and indeed—I believe an essentially incorrect—only one example of such a possible law has ever been given, of which I am aware, at least in this committee? The court would immediately say, "You are asking us whether gender equality will be damaged by a Quebec law, but you are not telling us what that law is, you are not telling us what the social purpose of that law is, you are not giving us any detail on which we can act."

I am not opposed to court references, but I simply say that this is not one that is likely to be productive of any result.



1650

Mr. Eves: I suppose Professor Baines would respond to that—and I hope I am not taking her words out of context or, more important, out of their intent—by saying that she firmly believes that all rights under the Charter of Rights should not be derogated or abrogated by the "distinct society" clause, period, no matter whose they are. I know you have pointed out cases in your brief where that has not been the case. I understand what you are saying. How would you respond to that?

Hon. Mr. Scott: The way I would respond is this. All of us understand that legislatures and parliaments are going to pass laws that discriminate against Canadians. The Reduce Impaired Driving Everywhere program is a law that discriminates against Canadians. Almost every law we pass discriminates in the sense that it prefers one group over another. An affirmative action law would be, on its face, a discriminatory law, except it is protecting. Almost all laws have that characteristic of discrimination. If all discrimination were absolutely prohibited, there would be almost no lawmaking.

Section 1 contemplates that laws which are discriminatory on their face can be saved, if they are laws that are demonstrated to be reasonable and justifiable in a free and democratic society, with all the restrictions that the court has built into the proof of that notion. That is why the RIDE program law is saved.

What we know is that the courts already permit the interests of road safety to justify a discriminatory law, permit the interests of public health to justify a discriminatory law and may permit—it has not been decided yet in the Supreme Court of Canada—the interests of public employment of young people to justify a law that makes retirement mandatory. There is an unexhausted catalogue of considerations that may justify a discriminatory act.

With all those things in the mix, why should one of those things not be the distinctiveness of Quebec, which is one of the fundamental facts of our life as Canadians? If we are going to put road safety in there, and it is in there, why should we not put the distinctiveness of Quebec in there? In a way, it can be said it is already in there, because the Quebec Court of Appeal, federally appointed judges, has already been considering it.

Frankly, I am not troubled by that difficulty, because I do not see the distinctiveness of Quebec society as having any gender, nexus or connection at all.

Mr. Eves: I will leave that subject of section 16. Suffice it to say that people such as the two individuals I have mentioned, among others, feel—especially Mr. Manning, I suppose, does feel strongly—that section 16 could very well be perceived by a court as creating a hierarchy of rights. You and Mr. Manning have not always agreed on all subjects, as we know, and from time to time have entered into some very interesting legal discussions, shall we say, in the Supreme Court of Canada.

Hon. Mr. Scott: I do not recall that.

Mr. Eves: You do not recall the Morgentaler decision in the Supreme Court.

Hon. Mr. Scott: I did not argue that case.

Mr. Chairman: Can I throw in a supplementary before we get away from the charter? I just want to be clear on one of the points you are making.

In the testimony that the chief commissioner for the Ontario Human Rights Commission gave, he argued that there should be, in effect, an override for the charter in terms of the accord.

If I understand correctly what you are saying and what appears in your brief at pages 33 and 34 when you talk about the Bill 30 case, it is that you see that when the court is looking at whatever the issue is, it will have in front of it a number of things, one of which is the "distinct society" clause, one of which is the charter, and that one really cannot say or one ought not to say that the charter automatically overrides the "distinct society." Is that a fair statement, that one has to look at those as they are there as part of the Constitution?

In referring to the Bill 30 case, you note that the Bill 30 case establishes that the charter cannot invalidate the "distinct society" clause. Do you see a problem then, that if one had said or if one did say that the charter, in whatever fashion, cannot be limited by the "distinct society" clause, that other things might get lost through that?

Hon. Mr. Scott: I must confess that I do not see the argument that is made there at all. The reality is that the Constitution of Canada contains many provisions that might be judged to be discriminatory. The provision that gives Prince Edward Island more representation per population than Ontario is a discriminatory provision which under the American Constitution might be at risk. There are a number of other provisions of the same type, such as the provision that gives more senators to certain provinces than others. The provision that judges of a superior court retire at 75 is a discriminatory provision.

All that the Bill 30 case says, as I read it—and that is a case where I did rather better than Mr. Manning, if we are looking for an example where we actually confronted each other—is that it focuses on the fact that there was a specific power in the Constitution, section 93, that said that a province hereafter can establish a dissentient school system. I am summarizing. Mr. Allen has memorized it. But that is essentially what it said.

What the courts had to say is, "Can we use the charter to strike out a part of our Constitution?" The answer to that, if I may respectfully say, was obvious. You cannot use the charter to strike down the representation-by-population rights of Prince Edward Island or to strike down the division of powers or to strike down an explicit grant of power in the Constitution which may be discriminatory. In that sense, the charter has never been available to strike out parts of the Constitution. That is point one. That is all the Bill 30 case said, that the explicit power in the Constitution that allowed a province to create a dissentient school system could not be written out of the Constitution by virtue of the charter.

The court did not have to say, but I think clearly would have said, that the way you exercise that power certainly can be examined in light of the charter. If the Roman Catholics of Ontario, in encouraging the government to establish a dissentient school system, to use the sort of exotic language of the Constitution, said, "We want it for boys only," then the charter comes in to determine whether that power granted by the Constitution to discriminate, to create a dissentient school system, is used otherwise in an appropriate way in light of the charter. That is all Bill 30 said. There was nothing else to be decided in the Bill 30 case but that question, and it was decided.

Now you come to the situation in front of us. You begin with the proposition that the charter cannot be used to write out parts of our Constitution. If what is meant by the so-called charter override is that the charter should be used to write out parts of our Constitution, I simply say that it is a provision of such extraordinary novelty that it boggles the mind. We are not surely going to write out the rights of Prince Edward Island by reference to the charter because they are discriminatory when that was the constitutional compromise that was made. If that is what "override" means, it seems to me that it is a proposition of extraordinary complexity and difficulty and very radical.

1700

Apart from that, what are we left with? We are left simply with the direction under the accord that when you are confronted by a discriminatory law coming from the province of Quebec and the courts have to judge whether it can be saved under section 1, together with all the things you can consider under section 1 in deciding whether the collective will is to have play over the discriminatory law, you must also add, for what it is worth—in some cases it may be worth nothing—the distinctive nature of Quebec society. That is the way I see it.

Mr. Allen: The other troubling case that has been put before us has been the question of aboriginal rights and the status of Indian women who have married outside the reserve who do not retain the same rights as males who have married outside the reserve. Is that in fact a case where aboriginal treaty rights established and recognized under the Constitution are in conflict in a serious and flagrant way with the gender equality provisions of the charter?

What is the nature of that encounter between those two elements? It would seem to follow from the argument that the gender question is inherent in the aboriginal culture and treaty rights embedded there that at some point the charter—at the point of the gender equality question—is going to come into conflict. How would that get resolved?

Hon. Mr. Scott: I think that problem was resolved in 1982 because subsection 35(4), which preserves existing aboriginal and treaty rights—

Mr. Allen: This is in the charter?

Hon. Mr. Scott: It is in the charter, subsection 35(4). I am sorry. If you have the binder, it is in the Constitution Act, 1982, and it provides, "Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

To respond to your problem, you have to try to envisage a Quebec law of the type that might discriminate. The example given by one of the commentators is: Let us take a law to advance the interests of immigrants which provided that male immigrants should get an advantage or female immigrants should suffer from some disadvantage; let us assume a Quebec law on that ground.

It seems to me that law would be a discriminatory law now and would fail or might fail to survive by virtue of section 1. I do not see how the presence of "distinct society" would save that kind of law, which was otherwise going to be defeated, because there is nothing in the distinctness. How would you argue that the distinctness of Quebec society permitted or required some



discrimination between the sexes? There simply would be no nexus between those two points.

Mr. Allen: I guess if the very future of Quebec society were threatened by, let us say, massive failure of reproduction—and of course the birth rate in Quebec is very low—there might be some legislation passed that would try to give to some women who adopted one kind of lifestyle, namely, family and reproductive lifestyle, a greater precedence in some respect and some affirmation as against others who did not. That could be argued to be a means of preserving, protecting and promoting the distinctiveness of Quebec society by virtue of the fact that the existence of the society itself was a precondition of the distinctiveness.

Hon. Mr. Scott: But let us actually follow that through. The classic kind of law, I presume, would be a provincial law that gave a benefit to women who had children which was denied to women who did not have children, a family allowance law.

I am not saying that the family allowance law may not be attacked on the basis of gender equality, although I have a hard time believing that such an attack would succeed. I simply say that it could hardly be saved by the distinctiveness of Quebec society. The distinctiveness of Quebec society is not founded on an inequality between the sexes. The distinctiveness of Quebec society is founded by the advancement of a common language and perhaps certain cultural characteristics, law predominantly: the Napoleonic Code is essentially the distinct feature of Quebec society, apart from language.

So I do not see how that law would be dealt with any differently after the accord than it would be dealt with before the accord. That is the problem. If there is a problem here, and we have spent a lot of time on this, we have to be able to identify what the problem is before we attempt to solve it. To solve a problem that you have not identified, for reasons I tried to give earlier, may create more problems than were there in the first place, because it will expand the concept of a distinct society.

Mr. Eves: There are a couple of other issues I would like to pursue. One is the agenda items for the next constitutional round. Several aboriginal groups have appeared before us, quite incensed, if I might say, that issues such as Senate reform and fisheries appear, anyway on the face of the next agenda for the next round, to have been given more prominence by the 11 first ministers than aboriginal rights and their pursuit of self-government.

First, would you agree with that? Second, they came up with a rather novel suggestion, at least we thought it was at the time, of introducing a companion resolution or amendment, as they called it, which would ensure that aboriginal rights would be put on the agenda for the next round but, at the same time, would not alter the wording of the current accord. Could I have your comments on both of those matters?

Hon. Mr. Scott: Let me say, as one who participated in the aboriginal constitutional conferences after we came in, in 1985, and who was very disappointed that it was not possible to make an amendment, notwithstanding I think pretty good effort on the part of the governments of Canada, Ontario, Manitoba and Nova Scotia, the failure of the western provinces apart from Manitoba to respond made that series of conferences a failure.

There was another reason that, in my opinion, may have contributed to

its failure, and that was that Quebec was not there. The presence of Quebec supporting Manitoba, Nova Scotia and Ontario would not have made the difference numerically, but I cannot comfortably say that it might not have created a psychological difference that would have given greater priority to the exercise than it had. I would say to my aboriginal friends that I think at the moment the prospect of an aboriginal constitutional amendment is unhappily remote, because I have not yet seen any change in the attitude of the western provinces from the position they took last year. Without such a change, it is clear there can be no such amendment.

Second, I would say to them that the adhesion of Quebec, which has a large native population and which has some demonstrated record under the James Bay agreement of acknowledging self-government and beginning to grapple with those important issues, is the critical precondition to looking at the aboriginal question again. It would be pointless to look at the aboriginal question, I regret to say, without Quebec being an active participant in Constitution-making.

1710

I think what you have to say when you look at it realistically is that until there is a significant change in the constitutional view of the three most westerly provinces, an aboriginal amendment of the type our native associates want is unlikely, and that has not happened yet. Second, it cannot occur without the passage of the Meech Lake accord or something like it, because the absence of Quebec will make it extremely difficult.

To deal with the second point you make, the companion resolution, if by companion resolution I understand a resolution expressing the sense of the committee about future constitutional initiatives, that is not designed to and will not impact on the Meech Lake proposals and will not be a fetter on Meech Lake in the sense that the approval of Meech Lake will occur but there will be a companion resolution.

Mr. Eves: Right.

Hon. Mr. Scott: If that is what companion resolution means, I leave that very much to the view of the committee to decide what it thinks its temper is and what the temper of the House is.

I take it that you would want to consider very carefully a companion resolution, on the other hand, that involves a constitutional amendment itself, because I know you are concerned about process. If you passed a constitutional resolution, you would in effect be imposing your process on the nine other provinces and the federal government, because until your resolution was considered and accepted or rejected by the other places, it would have no effect. It seems to me you would be uncomfortable, as we discuss process, in saying to the other provinces, "Well, it's this or nothing."

The first kind of companion resolution I understand, and I understand the committee's concern, but as far as our aboriginal people are concerned, getting a constitutional meeting is not the issue here. What is at issue is getting a change in political attitudes I referred to that will make it a meaningful meeting. The first change we need is—I will get in trouble if I say this—we need Quebec there. The second thing we need is some reflection in other provinces about the desirability of this process.

Mr. Allen: Or the government.

Hon. Mr. Scott: Yes, the governments of the other--

Mr. Allen: I was referring to the federal government.

Hon. Mr. Scott: Well, to its credit, the government of Canada made some very progressive overtures, not sufficient to meet the native people's needs, but going some distance—

Mr. Allen: I was referring only to federal governments.

Hon. Mr. Scott: I think Manitoba, Nova Scotia, Ontario and the federal government showed movement on this question, but there were not enough of us.

Getting a meeting for the aboriginal people is not the exercise, it seems to me. The exercise is doing what we can to change the attitude of governments on that critical question.

Mr. Eves: I appreciate the points you have made and I thank the Attorney General for his comments on the same. I might just leave that point by saying that several aboriginal leaders I have talked to have indicated they can hardly expect to make progress if they are not even at the bargaining table.

With respect to the territories, we have had many delegations and witnesses who appeared before the committee with respect to everything from admission of new provinces to rights of individuals—or opportunity is a better way of putting it, I suppose—to serve in the Canadian Senate or on the Supreme Court of Canada.

Are you satisfied that the Meech Lake accord, the way it is currently drafted, provides sufficient opportunity for qualified individuals to serve either in the Senate or on the Supreme Court of Canada, comparing them to the opportunities of residents in provinces of Canada?

Hon. Mr. Scott: The nomination requirement with respect to the Supreme Court is that you be a member of the bar of a province for, I think, 10 years and that you be nominated by the province.

In my experience, it is not universal—though I may be wrong about that—that those who practise law in the territories are members of one or other of the provincial bars. The reason for that is that the Court of Appeal for the Northwest Territories is in fact the Court of Appeal of Alberta, and the Court of Appeal for the Yukon is in fact the Court of Appeal of British Columbia. So I believe the members of the bars of the two territories are treated as members of the bar of those provinces and could be nominated in that sense. If they were nominated, even if they were not members of the bar, I cannot imagine the Prime Minister and his cabinet taking that technical objection.

With respect to the concern that the territories have made about their admission as provinces, I think their concern here is really less about the Meech Lake accord than it is about the amendments of 1982. Until 1982, the federal government had the unrestricted right to create provinces on its own, without asking anybody's permission, and that, I believe, is how Alberta and Saskatchewan came into Confederation. No other provinces were asked if we wanted Saskatchewan and Alberta to be created; the federal government had that exclusive power. It gave up that power in 1982, and it fell under the



seven-out-of-10 rule that was then in place. What has happened is that that part of the rule now requires unanimity.

But the real complaint of the territories, it seems to me—and it may be a very legitimate one—does not focus on Meech Lake; it focuses on the 1982 amendments. If it is their proposition that the 1982 amendments were wrong and that provinces should be created exclusively by the federal government or by some other mechanism, that is a matter that can be dealt with in the constitutional rejuvenation process. But that, if I may put it this way, while no doubt very pressing for my friends in the territories, is Meech Lake by a side wind. It is really 1982 that created the difficulty for them.

Mr. Eves: With respect to that point, as I heard the delegations that attended from the Yukon and the Northwest Territories before the committee, although you are quite accurate in saying that they were not at all pleased with the 1982 constitutional amendment, they said at least that was far superior to what was being proposed with unanimous agreement in the Meech Lake accord. I believe that is their position.

Hon. Mr. Scott: I think a realistic examination of who would be likely to support the adhesion of new provinces in the Northwest Territories and the Yukon and who would be likely to oppose those will reveal that, in terms of being admitted as provinces, there is no practical difference between 1982—there is obviously a numerical difference, but for those who are likely to stand in the way of provincial status being given to those territories, there is no practical difference in the two situations. I am not going to name names, but—

Mr. Eves: I am not so sure I agree, especially with respect to one of the territories, namely the Yukon.

Hon. Mr. Scott: I know something of the views of the provinces and the federal government on those questions, or their historic views, and I can count, so I am not sure the result of 1982 is any different. But their concern is a legitimate one, and it seems to me that, like a whole lot of legitimate constitutional concerns that we have had and that we will have for generations, it should take its place in the process.

The thing that concerns me—and the aboriginal conference made this perfectly plain—is that you cannot carry on a process that is meaningful in this country without Quebec.

Mr. Eves: The comment you made near the summation of your remarks about the importance of the vote that members of the Legislature will be taking on the Meech Lake accord I quite agree with. I and several others on the committee and elsewhere have stated, and several witnesses have appeared before the committee have said, that they view amending one's Constitution as a very nonpartisan issue. We all have valid concerns and, I am convinced, sincere concerns, and we may differ as to what different legalities are or probabilities are of certain events; but it is a very fundamental issue that we are dealing with to the future of Canada, not just Ontario.

Would you be in favour of a free vote on such an issue? That is, a vote not whipped, not according to party lines, but each individual member of the Legislature of Ontario voting according to his or her own conscience on this.

Hon. Mr. Scott: That is up to the Premier to decide. I cannot give you any views about that at all. It seems to me that if we value political parties in the process, one of the things about political parties is that they should stand for things. It is very difficult to know how you are going to cast your vote if parties have free votes all the time. A party has to stand for something.

Mr. Breaugh: Oh, the minister is on dangerous ground here.

Hon. Mr. Scott: Let me be perfectly clear. I do not know how other members feel, but when I was elected in 1987, Meech Lake was on the national agenda. It was being discussed. It perhaps did not attract as much attention as some other issues, but certainly in my riding there were a lot of people who were concerned about it, who asked questions about it, and they all knew where I stood. I told them. I hope some of them liked it, but I am quite content to understand that some did not. But a significant majority of the people voted for me, notwithstanding my views.

So I do not feel that I am in any difficulty about voting on this issue. Now, whether the party should have a free vote is up to the Premier. I do not think free votes are part of the tradition around here except on major moral questions, and I do not regard this as a moral question. This is a question of how we, as politicians in the best sense, see the shaping and development of our country. If we are opposed to its developing in this way, then the party that has that view should say so.

It is a bad week to spring to the defence of John Turner—or maybe it is exactly the right week.

Mr. Breaugh: It is a good week. There is a short lineup there.

Hon. Mr. Scott: But I think John Turner, whatever else may be said about him, has stood for something on this issue. Now, it has cost, and that is all right. Politicians should be expected to pay a cost if they do things that their constituents do not like, and we do pay a cost. But I hope it is the policy of our party to support the Meech Lake accord, and if it is the policy of our party, then the party votes for it.

Mr. Eves: Well, OK. I disagree.

Hon. Mr. Scott: And I believe the other parties will form a policy, if they have not already, with respect to Meech Lake and support that policy.

Mr. Eves: I disagree that the issue of amending one's Constitution should be an issue of partisan politics. It is not only politicians at stake here. More important, there are individual Canadians out there, actual constituents, who maybe have a viewpoint.

Hon. Mr. Scott: If I can give you some examples. The great Canadian politicians who faced issues of constitutionalism and unity, like Macdonald, Laurier, Mackenzie King and Pearson, all made these questions questions of party policy. You can see example after example. They stood for something. The country was to be constitutionally governed in a certain way, and they stood for it. You can make whatever criticisms you want about Mackenzie King, but on issues of national unity and issues of constitutionalism the party, for better or for worse, closed ranks, and people left it if they were not prepared to accept the essential distinctiveness of Canadian society, when there were very tough times to deal with, like the Second World War, conscription and issues of that type.

Mr. Eves: I think this whole discussion that we have just had brings us to the last point I want to cover, which is the point of process and future constitutional amendment and process. What advice or direction would you have, or suggestion may you have, to the committee with respect to future process in constitutional reform?

Hon. Mr. Scott: I think we are all searching for a process that is better in this area or in any other area. I do not know what the solution is. I am certain the committee, by its very process today, is making some contribution to this and, by its report, will be able to make another one.

It seems to me that there are a number of things we have to contemplate. We have to contemplate, first of all, that governments will be authorized to act in terms of constitutional amendments. Constitutional amendments are not going to be made by inchoate groups sort of wandering around and coalescing. Governments have to take a lead and, at some stage in the process, governments which are to negotiate with other governments have to make choices. So that is the first thing.

The second thing is that legislatures, it seems to me, should play a part in that exercise—before the event if it is possible, after the event certainly—and the public should be engaged in the exercise. Now, how you run those three things together when you end up meeting with 10 other governments I am not quite certain. I just do not know the answer to that question. I think the three values are the ones that I have described, but, on the other hand, we do not want to create a process that will immobilize us, because the particular genius of our country is that we have been able to respond to the necessity for change.

Does anybody remember—and I do not say this to you, Mr. Eves—the enormous resentment that some political parties had to the repatriation of the Canadian Constitution in the form which it took? I am not criticizing that. I am simply saying that if consensus-making was the order of the day, Mr. Trudeau might not have had some of the achievements that he has now had. Executive federalism was very large in 1981 and 1982.

But I would be glad of your views. You are the experts. You have been through this part of the process. You can tell us how we can make the whole thing better.

Mr. Eves: I think if there is anything that everybody on this committee has learned, it is that nobody is an expert with respect to this particular process.

Hon. Mr. Scott: I thought I would just flatter you.

Mr. Eves: It did not work.

With respect to process, I can safely say, I think, that for the overwhelming majority of witnesses who have had a criticism of the process up to now, it has been that the public has not had a meaningful way of having any input before the fact. We have had several witnesses indicate to us that, in their opinion, the only province that really had an opportunity for input, for example between the end of the Meech Lake draft and the Langevin document, was Quebec. The other provinces could have but chose not to avail themselves of that opportunity.

Now, I appreciate that the time frame was very short, but with respect



to future constitutional process, I can just tell you that the witnesses who have appeared before this committee feel very frustrated and they feel as if they are dealing with this matter after the fact.

Hon. Mr. Scott: It is a world of flux. All our views are changing about the process and, indeed, about the accord. Professor Whyte, who was here this morning—I do not know whether he owned up to it—between Langevin and Meech Lake wrote a newspaper article that said the Meech Lake accord was the most modest assertion of Quebec's position in several generations and should promptly be accepted.

Upon reflection, he has changed his view, and I understand that. There is nothing wrong with that. If I may say so, I have become more committed to the accord than I think I probably was at an earlier stage, because of my sense of where we are in this country. All our views on process are going to change, but the key thing is that we should not develop a process that will immobilize us. On the other hand, we should not develop a process that will exclude the public and the legislators. How that is going to be done, I do not know.

1730

Mr. Eves: Thank you.

Mr. Chairman: Mr. Cordiano, you have been very patient. The floor is yours.

Mr. Cordiano: I just want to thank the Attorney General and his staff for coming here today and presenting this very interesting brief, which I am sure will help each and every one of the members on the committee reach some conclusions about the testimony we have heard. Certainly I, for one, will read it very soon and probably delight in reading it. After the last three months of a lot of testimony and a lot of reading to do on this, it will put things in some perspective.

Let me touch on one theme, because there are some of my colleagues who do want to ask other questions and you have touched on a number of other matters in the accord. I want to concentrate on what I think is possibly a very difficult area, and perhaps we do not have a clear view on this committee of how to proceed with that. But certainly we heard from many different cultural and ethnic groups who came before the committee. You have read some of the testimony and you have seen what some of their views and points are leading to.

The various groups that have come before the committee have pointedly made remarks that section 16 was included in the accord as perhaps an afterthought. Perhaps it was just thrown in to placate, if you will, or to satisfy those people and various groups that would see the accord as a difficult area for them. It is my view that section 16 is essential to the accord, and given the fact that we are talking about culture and the distinct nature or character of Quebec, that makes it essential to have section 16 in the accord. But, of course, these groups are very frustrated and have come before us. I think the source of their frustration lies with the 1982 Constitution. Would you agree with me on that?

Hon. Mr. Scott: Yes. I have read some people who have given evidence before the committee who have said we do not need section 16; it is sort of an afterthought and we could do without it. I do not think we could do without

it. I think it is critical, because there is a nexus between cultural interests and the distinct society, as there is a nexus between language and the distinct society. As I tried to show, there is not a nexus between gender or the handicapped and the distinct society. That is why you need section 16 and why I think it is wrong to refer to it as an afterthought.

What does section 16 preserve? It preserves—

Mr. Cordiano: Section 27 of the charter.

Hon. Mr. Scott: —section 27 of the charter. Section 27 is simply an interpretation section. Some multicultural groups may say: "It gives us no rights. It simply requires other matters to be interpreted in the light of our heritage." In that sense, I think what many of them are saying to us is: "Look, we want firmer charter rights than we have. We want a better section 27 than we have."

Without passing on whether that is likely or not, it again seems to me to reflect the fact that many people who are analysing the accord are looking at it and saying, "Look, this may be fine for Quebec, but it does not do what I want it to do." The territories are really complaining about the 1982 changes when they say they cannot become provinces. I think multicultural groups are complaining about the 1982 determination and are sad and disappointed that it was not resolved at Meech Lake. But this is a process.

Let me tell you, having been through the aboriginal exercise, there is no point in trying to amend anything if you do not have Quebec at the table. I exaggerate, but the prospect of achieving the percentages that are required under the old Constitution is gone if you do not have Quebec in the process. That is why I think everybody decided, not that this was to be the last constitutional round ever held—it was contemplated that it was to be the first of a series—but that the first had to be one that brought a critical player on to the scene or we would never get any other constitutional changes.

So I say to my aboriginal friends who confronted me with this, and it is the same answer you can make to other groups: "Look, this is the precondition, the essential precondition, to beginning to analyse the changes in the charter or the Constitution that you people think are appropriate."

Mr. Cordiano: I think it is important to point out that culture is a very essential aspect of any society, but certainly in Canada. When various ethnic groups point to a frustration and try to articulate that frustration in terms of what their aspirations are, they can only point to culture as one of the main features of Canadian identity for them.

Having said that, we all recognize that multiculturalism is something all Canadians adhere to in the positive sense of culture and that diversity is essential; in fact, we like to have a country which is pluralistic in many ways. But where language is concerned, we do have two linguistic realities. Everyone accepts that, and it works very well; it has worked very well to this point.

Do you think that some of the frustration, some of the difficulties that perhaps various groups feel about culture and about just what multiculturalism means to each and every one of us, because it encompasses all Canadians, can be brought to the constitutional bargaining table for them to put forward their assertions about what should be constitutionalized? Then, with all due respect to most people who have come before this committee, we get into a very

difficult area, because it is not clear what we mean by that, and I think we have to clarify it.

Hon. Mr. Scott: It is a very difficult area, and I have nothing to say about it except that I think the prospect of any constitutional amendments, and I guess I am affected by the aboriginal experience, without the adhesion of Quebec is so remote as to be written off. This is the essential precondition. I am frankly disheartened when people say, "Look, we have an agenda that follows 1982, too, and you should have put it in this round."

I understand their anxiety to do it, but it seemed to me that this was the orderly way. It may not be the end, but until the adhesion of Quebec and its presence at constitutional conferences is achieved, we are not going to get any other constitutional revision in the country. I would hope that if the Meech Lake accord is adopted, we can then move on to other agendas.

The thing that frightens me more than anything else is not the assertion that this amendment is imperfect, but that if we cannot do it now—it is a unique historical event—what is before us? What is before us is probably another generation of constitutional preoccupation at the very time in our national life when we are going to be the most stressed from international competition, that, whether we like it or not, we seem to be going into a free trade world, when we have to be fully occupied with other items on the agenda, and we will begin this internal constitutionalism that occupied us for so long over the last two decades, preoccupied with these issues, to no avail.

I do not know what the historians have told you, but I cannot think of any historian's evidence. I read where any historian failed to concede, even Ramsay Cook, that this was the most modest proposal ever made. He does not like it, but he does not deny it is the most modest proposal ever made. So if we reject it, and maybe it will be rejected, where does it leave us? It leaves us inviting Quebec to make a more modest proposal still, or a different proposal which may be judged to be more modest, especially if it deals with distinct society or shared-cost programs, and it leaves us with the business of trying to obtain consensus, not only among people but among governments; and I envisage a decade just as before.

#### 1740

The last constitutional amendment we obtained in the country we obtained by excluding a government and saying, "We're not going to deal with your items now," and that government was Quebec.

They went away and then came back and asked: "Will you deal with them now? You put in gender equality in 1982, you put in aboriginal rights in 1982, you put in multicultural rights. You dealt with all these other concerns. You said you weren't going to deal with us and our concerns and you sent us away. Now it is 1988. Will you deal with us now? And here are the things, not new things, things we have historically always been concerned about and things which in their present formulation have been advanced by federal governments and provincial governments over the last 20 years. Will you do it now?"

I think if the answer is, "No, we will not do it now," because it is not perfect or because we want to do something else for some other concerned group, we expose ourselves to—and it may be right to do it—a national preoccupation over the next decade or so that will distract our attention from a lot of matters that are very important.



Mr. Cordiano: This is my final point. One of the things that this committee will probably do, looking forward, is recommend a number of items for the agenda at future constitutional meetings, so responding to your point, I think it is crucial for us to look at those things. All of us have pondered and posed those things to each other, and I think we will probably be writing that into our report.

Mr. Breaugh: I have just a couple of things that I would like to pursue with you a bit. It is pretty apparent for those of us who sat through the hearings that a proposal to say, "We'll get you next time," or "We will resolve this problem of yours the next time," does not sit well with people who are unsure of what that means. What is the next time? What is the process? I think, in part, the committee does have to respond to that. It has to establish to people: "You do not just have to take anybody's word for it. Here is the process. Here is how your concerns will be met."

I had a quick look through your brief and I did not see much in the way of outlining what that might be. I appreciate your response that none of us really knows what that process is going to be, but somehow I feel an obligation, as a member of the committee, to solve a problem that probably was created by the joint committee.

The joint committee responded to a lot of these groups by simply saying, "You're wrong." They did not like that a whole lot, and the joint committee, I suppose, in hindsight probably would prefer at this point in time not to say that. The Senate committee certainly did not say that and went out of its way to try to accommodate them.

Is it your view that we proceed no matter what? I want to caution you that I feel this obligation, that in some way whether we choose to move amendments or not is not the critical question; the question is people have raised really legitimate concerns with us. If I were to generalize them, I would say that it really comes to a focal point around the Charter of Rights and what is the impact between this agreement and the previous agreement. Somebody has to address that.

What is your view on the committee's responsibilities to respond to all of these concerns that have been brought forward? I did not hear anybody say, "We don't care about Quebec." Most of the people who appeared before us went out of their way to say, "The inclusion of Quebec into this agreement is important. They must be at the table and we accept that." So there were countless numbers of groups who were mad as hell about this agreement, but they were not angry against Quebec. How do we respond to that?

Hon. Mr. Scott: The women's interest, as I understand it, is slightly different, but I think the interest of the groups that you are talking about basically is, "Look, you are amending this Constitution, and we have a problem with the 1982 Constitution that you have not dealt with yet."

Mr. Breaugh: Yes.

Hon. Mr. Scott: That is the aboriginal case, the multicultural case. I believe it is the territories case, apart from the Supreme Court—well, even with the Supreme Court. They are complaining that they did not get in 1982 what they thought they should get. That is a legitimate concern, and the committee has every right to respond and will respond to it by analysing it or assigning to it whatever priority it thinks it should have. Certainly the government, and undoubtedly the Legislature, is anxious to hear what you have to say on that subject.

I think the taxing question for me is, with respect to the groups who feel very vigorously that 1982 did not get them what they needed or what was appropriate for their problems, whether the failure to get it now should impede this. That is the issue, it seems to me.

All right, there are a number of people who did not get what they wanted out of 1982. The aboriginal people are one group, the multicultural community is another group and Quebec is another group. Is the fact that all those problems were not wrapped up at the same time fatal to this accord? I would have thought that the answer to that is no. One of the problems outstanding from 1982 can now be put to rest. It is interesting that the solution of this particular problem, I believe, will make the solution of other outstanding problems easier.

I must tell you frankly—as I was saying, I think, before you came in; perhaps after—that I understand the desire of aboriginal people to return to the constitutional table again, even with all the angst and preoccupation that it involved for them. I understand their anxiety to do that, and I hope it all works out. To do it without this being done, it seems to me, is idle. It seems to me you do not say: "Well, we did not serve all the people. Therefore we should reject this accord until we do," particularly when this very accord is going to make it easier, I believe, in the long run, not harder, to serve other interests.

I cannot predict, but Quebec would have been at the aboriginal constitutional table, and Quebec's tradition in dealing with aboriginal people—the James Bay agreement, the first major self-government project in Canadian history for aboriginal people—I think, would have fortified the interests that want to support the aboriginal constitutional claim.

So I expect the committee to say what it thinks of the future.

Mr. Breaugh: Let me ask just one other question then. In many ways, this committee is positioned rather nicely to respond to groups who have raised concerns, to address itself to what might be the most vexing problems, to exercise or propose that it exercise some of the solutions that others have drafted and put before it.

The accord was essentially put together on the premise that there was an ability to deliver, on the part of the 10 premiers and the Prime Minister, an agreement. In other words, at the heart of the argument around Meech Lake is that these folks got together and said: "Well, this is the deal. I can go back home and deliver the deal. My Legislature will agree with this. There will be those who will dissent, there are those who are offside, obviously, but the vote will carry."

It is now apparent that at least two of the provinces cannot deliver, or at least the delivery is in question. What concerns me somewhat is, what do we do? I suppose one option is for Ontario to simply say, "We agreed to the deal initially." It seems to be having trouble these days, but it is conceivable that this government could actually get a vote put and win the vote upstairs in the chamber. It has not had great success on that lately, but it is possible that it would carry.

1750

Hon. Mr. Scott: No, we have been very effective.

Mr. Breaugh: But even if we did, there are now two other provinces where that seems to be a very real political question. For example, can New Brunswick and Manitoba scuttle this arrangement by simply not dealing with the matter over the period of the agreement? It seems to me that that is possible. In the Manitoba situation, where there is a minority government, those who are less than courageous may be choosing that path: "If we do not want to fight on this, or if we are not clear which way the vote will go, we will use the time-honoured tradition of not putting it on the agenda." So we now have two players who, if they are not offside, are sure straddling the blue line here.

What is your recommendation to the committee? Do we seize the opportunity to try to resolve the differences? And I am mindful that, for example, what Frank McKenna has said are his concerns are surely not unique. In a nutshell, that is—

Hon. Mr. Scott: Fish is not high on your list, I gather.

Mr. Breaugh: Well, no. But, you know, his version of the things he is concerned about reflects, I think, a kind of a one-page analysis of what the committee has heard over a rather lengthy period of time. It is not as clear what are the concerns of the Manitoba political parties around the accord and whether you could address yourselves to that. Should we seize the opportunity now and try to put together a package that would, in fact, bring both of those provinces on side and would not take any of the current players in agreement with the accord offside? Or should we just simply do what the Premier (Mr. Peterson) wants us to do and let somebody else take the heat for it?

Hon. Mr. Scott: I think it would be very dangerous for this committee to begin the brokerage exercise, because I presume if you are going to broker one way—that is, broker Manitoba and New Brunswick into the deal—you are also going to broker Quebec into the new deal that you have brokered to get Manitoba and New Brunswick on board. It seems to me that, for a legislative committee, that is sort of an unwieldy exercise. It provide a lot of travel, undoubtedly, but—

Mr. Breaugh: Be careful now. You and I have put together deals that were totally unprecedented and did cause some disruption to the normal flow of political power in one province.

Hon. Mr. Scott: Sure; yes, we did, but I think the last time we did that, we agreed never to try to do it again.

Mr. Breaugh: That is what it says on the back of my watch.

Hon. Mr. Scott: You have still got the watch, have you?

Mr. Breaugh: I have it nailed to my wrist. I have been in your company too often.

Hon. Mr. Scott: First of all let me say that I think you misconceive what the government did when it made this deal. We did not promise that the Legislature of Ontario would vote for it. We did not control the Legislature of Ontario. We were in a minority government, and this exercise was not mentioned in the agreement that you drafted for us to sign in 1985.

Mr. Breaugh: We could have had an opener.



Hon. Mr. Scott: So when the Premier signed and indicated his effort to support the accord, we did not control the Legislature of Ontario in a political sense. I was dispatched to come here and meet with the leader of the New Democratic Party and with the then leader of the Conservative Party, both of whom indicated their support for this document. I mean, the document was not something we promised we would pass. We obtained support for it from the then leaders of both parties, in general terms and without any commitment to any detail, because we were between the Meech Lake exercise and the Langevin block exercise when these briefings took place. But we knew perfectly well, having got a draft agreement at Meech Lake, that we could not even say what the Legislature would do until we had spoken to the other two parties, which we did.

So the Premier's commitment was to do his best. Now as to what our roles should be, bearing in mind what is happening out there in the other provinces, I think our role should be to do what we think is in the interests of Canada, right here. Let us let Albertans look after themselves on this issue and Manitobans look after themselves. Let us in Ontario do what we think is good for Canada, and let the chips fall where they may.

The brokerage exercise, it seems to me, is next to impossible to engage in through a legislative committee. I do not even know how you would begin; you might have some ideas. It is very dangerous, because once you broker one side, then you have got to be able to broker the other or the whole thing falls apart, because part of your brokerage exercise is, of course, the implicit promise about what you are going to do if this brokering associate will do that. So if you get Manitoba on board, you only get Manitoba on board. If you imply to Manitoba that if it does this, Ontario will do that, then when you go to Quebec and say if it does this, you will do that, you may find you have promised to do two different things. It is a difficult exercise and I would not do it.

I think this is a critical moment for the Legislature and for Canada. When you look at the history of this country, almost from its beginning the worst moments in our national history in terms of unity have been when Quebec and Ontario were not able to stand side by side on a national issue. We have had those moments. We had them under Laurier and we had them under Mackenzie King. The moments in our history where the fracture of the country was most likely was when Ontario and Quebec, no doubt for perfectly sound reasons, took different positions on major issues of national policy.

My attitude to this, and I speak personally, is that if other provinces elect not to pass the resolution and it is therefore doomed to defeat in a constitutional sense, I hope Ontario none the less will pass it, so it can never be said at the end of the day that when the country was about to be made whole, Ontario withheld its support and plunged us into a generation of constitutional difficulty. That is the way I would look at it personally.

Mr. Breaugh: I appreciate your response. It struck me as somewhat ironic that most of the groups that appeared in front of this committee made that exact same argument. They argued that the Meech Lake accord in fact was a brokerage exercise and that this was its main flaw. People did not sit down and do what was best for the country: they did a deal. I think most of us on this committee now have no taste for a repeat performance of that.

Hon. Mr. Scott: I do not think that is true.

Mr. Breaugh: That is certainly the perception.

Hon. Mr. Scott: The process may be a brokerage process, as inevitably any process is. It is brokerage. You sit down to discuss issues and try to find an accommodation. "Finding an accommodation" is another way to describe "a brokerage process." One is pejorative; the other is positive. They both describe the same process. "Finding an accommodation" is what we were doing here if you like it; "brokerage the Constitution" is what we were doing if you do not like the result.

I think much more useful than looking at that is the question of whether this is in the national interest for the country. I am not slavish about it. I will not say it is a perfect document. I will not say that if I was made king for a day—

Mr. Breaugh: God forbid.

Hon. Mr. Scott: God forbid, and rightly said.

Mr. Breaugh: I am a little queasy about you being Attorney General for a day.

Hon. Mr. Scott: I concede that if my own particular vision were to be imposed on the rest of my subjects, I would be stating this in a completely different form. But I say if we are going to try to accommodate a series of competing visions, this, for our time, it seems to me, is a sound document.

I met with a group of young people in my party who started talking to me about the vision they had for the country. To be frank, the vision they had they did not see in the Meech Lake arrangement. I said: "You are all at college or university. Have you ever talked to your opposite numbers in Quebec about their vision for the country? You're going to find you have two fundamentally different visions. One is highly centralist; the other is regional."

If it is going to be whose vision wins, we are not going to have the constitutional renewal we promised at the time of the referendum. If the question, on the other hand, is going to be not whose vision wins, but how we can construct a constitutional space in which we allow politics to continue so we can solve our mutual problems, if that is going to be the question, I think you will come to something very like this accord. That is why I support it.

1800

Mrs. Cunningham: I have a brief question for the Attorney General. I very much appreciated listening to your talk this afternoon.

If, according to what you stated today, in fact we did not in 1982 deal with four or five other areas of concern, as a couple of examples, aboriginal rights and gender equality rights, if we did not do it and it is still outstanding, if we are to deal now with Quebec in this particular form, would you then be saying to us—because you are recommending we do it and I understand all the problems with it and I share your concern about preoccupation—or would we be saying as a committee, that we feel the rights that were not dealt with, i.e. Quebec, are therefore more important than the rights of the aboriginal people or of women, of gender?

Hon. Mr. Scott: No.

Mrs. Cunningham: How do you answer the question?

Hon. Mr. Scott: I think the first thing is that we did deal with most of those things in 1982. We dealt with gender equality. Now, the women of Canada are perfectly entitled to say that the Canadian politicians of the day dealt with it at the end of the game and almost as a side issue, under very great pressure from the women of Canada. The women of Canada made the politicians deal with it in 1982. That is very much to the credit of the women of Canada, and a number of us here supported them. So gender equality is established as part of our Charter.

The aboriginal people got a process that is a constitutional renewal process which has been extinguished by time. That is what they got, and certainly the recognition of existing aboriginal and treaty rights, so they were served, though not fully served. The multicultural groups got, in section 27, an interpretative provision designed to allow other rights to be examined in light of their cultural interests.

I think the point to be made is that almost everybody at the constitutional amendment table got served in 1982, some not as well as they would like to be and some not quite in the way they wanted to be, but they were all served except Quebec. Therefore, this so-called round was inevitable.

I think the answer you make to those people is that one group's rights are only more important than others if you have a vision of constitutionalism that you seek to impose on others. If you are a unitary government type, a centralist who believes, as some Americans did, that the federal system is bad, then obviously the rights of collectivities or associations may be less important than central government rights.

All these rights are equally important. What is critical about this round is that we are now in a position to serve one legitimate claimant that was not served in 1982. I believe that following that, we will be able to provide service to other groups, like aboriginal groups, in the medium term, who were inadequately served, as they judge it, in 1982, and perhaps the territories.

Mr. Chairman: Thank you very much. You have been very good with your time. I think while we could probably go on, and we have said this with many of the witnesses—

Hon. Mr. Scott: You mean you do not mean it.

Mr. Chairman: We reach a point where we all perhaps become a bit brain dead.

As we conclude the public hearings part of our proceedings and to pick up perhaps a bit on what Mr. Breaugh said, I would like to note that I think one of the things that has become very clear to the committee as we have gone through the last three or four months is how important this kind of process we have been involved in is, and that the kind of discussion that ensures that individuals and groups, in some way or other, are able to come forward and talk about what is good and what is bad, whatever their views might be in terms of the acceptance, ultimately, of whatever the constitutional change is, is very important.

It is not to say this was not important in 1982 or in the early 1970s or back in the 1960s, but I think we have become extremely aware of a consciousness out there about the importance of the Constitution, and I guess it would be fair to say, in particular about the charter.



In some cases, maybe there are too many expectations that are linked with the charter. Maybe no charter can do what everyone expects. None the less, as we have gone through these hearings, we have realized that there is a community of interest out there that felt it had been cut off from the process. Hindsight is always easy, but I think we have moved into a new era in constitution-making where we are most definitely going to have to grapple with finding some new ways of dealing with people's views and concerns.

In this committee's report, whatever its final recommendations are, it is going to be very critical that those who came before us can see in our report that we heard them and listened to them. It would be impossible for the committee to respond to every concern that has been raised, and I would hope not everyone is expecting that. None the less, having agreed to have the hearings, it is absolutely essential that our report be able to deal with concerns that were raised, while at the same time having to make, at times, some tough decisions in terms of whether we go this way or that way. I think your comments in that regard are most valid.

At the end, in speaking to the broader audience, for all of us this has been an incredible learning experience. As part of future processes that we will use for constitution-making, we need to have this kind of give and take and discussion. In that regard, we thank you very much for being here this afternoon and sharing your thoughts so frankly.

Hon. Mr. Scott: Just before you adjourn, Mr. Chairman, and without prolonging the matter, I would like to observe one thing. This matter came on the national and provincial agenda very shortly after we came into office in 1985. Since that time, there have been a number of people working in my ministry and in the Ministry of Intergovernmental Affairs, only two of whom are at the table but others are sitting in the room—you know who they are because they stayed so late—who have devoted untold hours and enormous effort to this exercise.

When I take them out for a beer, they will tell me that I made the wrong answer to X and that I could have dealt with Breaugh a little better if I had said thus and so. I understand that, and as a mouthpiece, I had to give shape to the views of the government, which they, as public servants, may not always accept in detail.

I have been stunned by the enormous effort that these people, mostly young—I guess you do not live long in constitutional law—have put into this effort. To me, the really moving thing about it, and this to me is part of being an Ontarian, is that invariably the question they asked was, "What is good for Canada?" I enjoyed the experience.

Mr. Chairman: I think we have also got to know all of them over this period and enjoyed having them with us. They have been very helpful to members of the committee as well.

The committee adjourned at 6:09 p.m.







NOV 7 1990



